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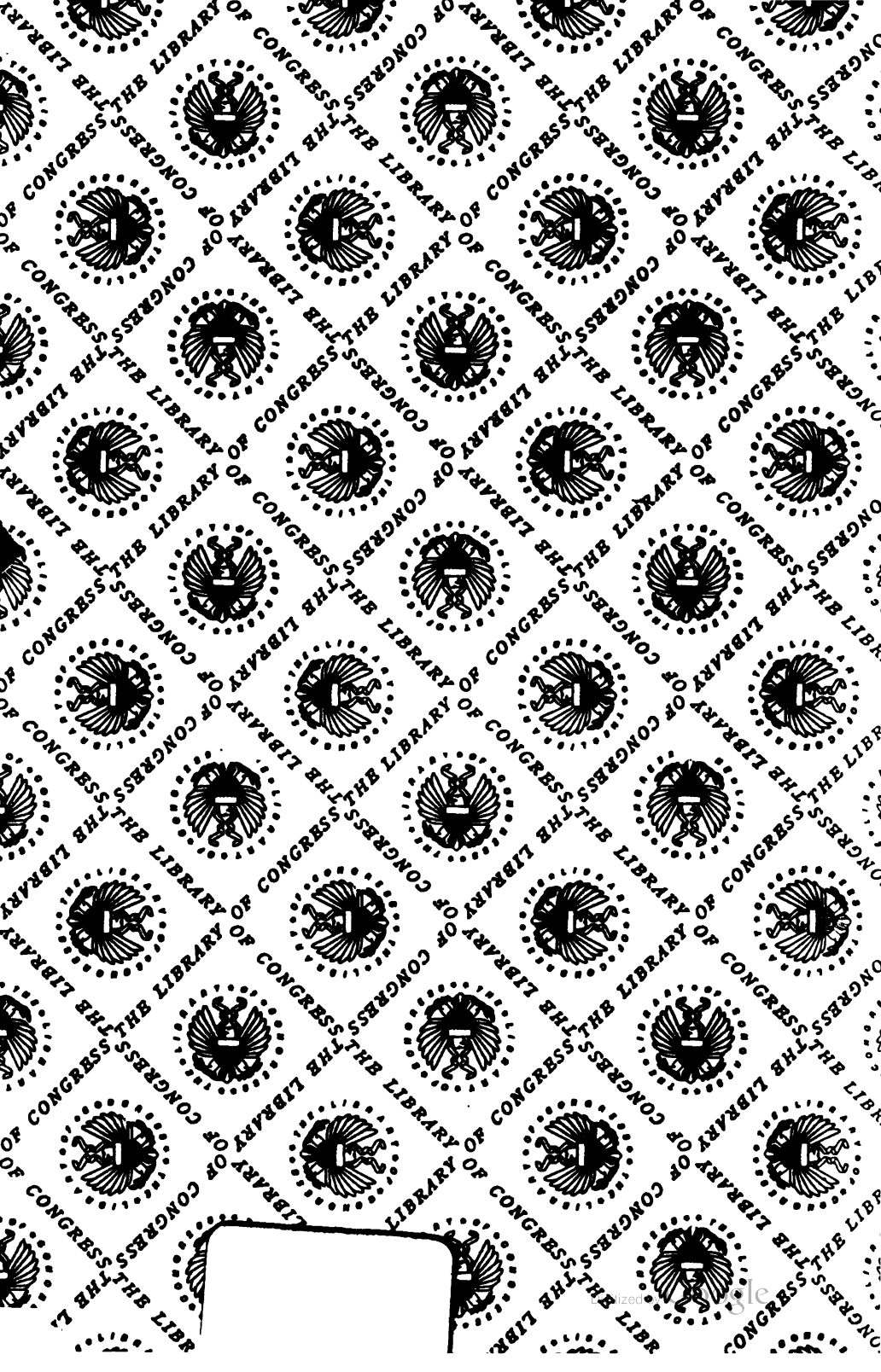
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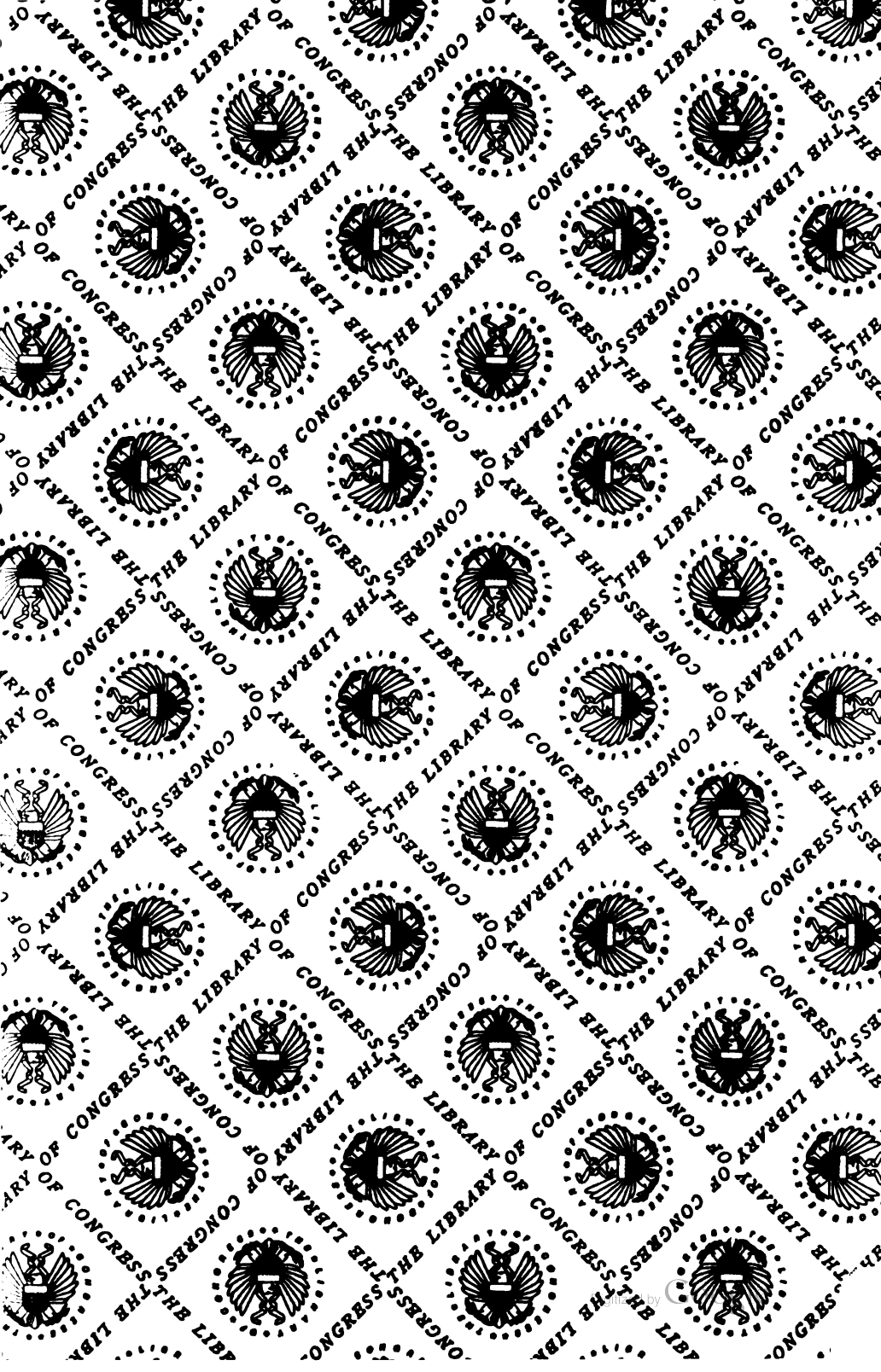
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**TO PROVIDE FOR THE ACQUISITION BY THE UNITED
STATES OF PRIVATE PROPERTY NEEDED FOR THE
NATIONAL SECURITY AND DEFENSE**

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BEFORE THE

COMMITTEE ON THE JUDICIARY

(SUBCOMMITTEE NO. 1—CIVIL AND CRIMINAL LAW.)

HOUSE OF REPRESENTATIVES

SIXTY-FIFTH CONGRESS

SECOND SESSION

ON

H. R. 11136

Serial 61

APRIL 26, 1918



**WASHINGTON
GOVERNMENT PRINTING OFFICE
1918**

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COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

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GEORGE S. GRAHAM.

TO PROVIDE FOR THE ACQUISITION BY THE UNITED STATES
OF PRIVATE PROPERTY NEEDED FOR THE NATIONAL SE-
CURITY AND DEFENSE.

SERIAL 61.

COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE No. 1,
HOUSE OF REPRESENTATIVES,
Friday, April 26, 1918.

A subcommittee of the Committee on the Judiciary met at 10.30 a. m., with Hon. Warren Gard, presiding, there being present also Mr. Whaley, Mr. Neely, and Mr. Volstead, of the committee, having under consideration H. R. 11136.

Mr. GARD. Representatives of the Army are here to tell us regarding H. R. 11136, which is a bill to authorize the acquisition by the United States during the period of the present war of private property of any kind and all kinds, real, personal, and mixed, when needed for the national security and defense or the conduct of the Govern-

ment, to provide a method of such acquisition, and for other purposes, which was introduced by Mr. Dent at the request of the War Department. It has been sent to this committee.

I have asked that these gentlemen come down and explain the matter to us. I haven't gone over the bill, and I would be very glad to have either of you gentlemen or both of you explain the need of the bill and such amendments or changes as you deem advisable.

STATEMENT OF LIEUT. COL. L. W. CALL, JUDGE ADVOCATE GENERAL.

Col. CALL. First speaking of the needs of this legislation with regard to the acquisition of real property for the uses of the War Department—I present the following memorandum:

MARCH 21, 1918

Memorandum for Gen. Crowder.

Subject: Legislation for acquisition of real and personal property.

In considering the need of this legislation, it will be convenient to consider the subject first with reference to real property, and second with reference to personal property.

I. AS TO REAL PROPERTY.

1. Section 3736, Revised Statutes, provides: "No lands shall be purchased on account of the United States except under a law authorizing such purchases;" and section 355, Revised Statutes, prohibits the expenditure of money on lands purchased, i. e., acquired otherwise than by descent, until these conditions are satisfied, viz: (a) The title is approved by the Attorney General, and (b) jurisdiction over such lands is ceded by the State.

2. Under the law as existing at the beginning of the war it was necessary, if lands were to be acquired by the United States, (a) that express authority be given by Congress for such acquisition; (b) if the lands could not be obtained by purchase, it is also necessary that express authority of Congress be given to acquire them by condemnation; (c) the approval of the title by the Attorney General; (d) cession of jurisdiction by the State.

3. Prior to war.—Except in special cases, the following statutes may be cited as giving the existing legislation, at the commencement of the war, for the acquisition of land for War Department purposes:

(a) The act of August 18, 1890 (26 Stat., 316), as amended April 28, 1904 (33 Stat., 497), authorizing acquisition of land by purchase or condemnation for sites for works of fortifications and coast defenses, including sufficient land in connection therewith for barracks and quarters for such fortifications.

(b) The act of April 24, 1888 (25 Stat., 94), authorizing acquisition by purchase, condemnation, or donation of land needed for river and harbor improvements for which provision has been made by law.

(c) The act of August 1, 1888 (25 Stat., 357), giving general authority, in cases where the procurement of real estate for public uses has been authorized by Congress, to acquire same by condemnation.

4. Insufficiency of legislation.—It will be manifest that these statutes could not meet the requirements of war conditions for the following reasons:

(a) The limited scope of the authority.

(b) The time necessary to comply with the requirements of section 355, Revised Statutes, supra, and to acquire the property through condemnation proceedings where the same could not be acquired by purchase.

5. Legislation to meet war conditions.—(a) Acts of May 12, 1917 (40 Stat., 42), and June 15, 1917 (40 Stat., 187), authorizing acquisition by purchase, donation, or condemnation of "such land sites throughout the United States as are immediately necessary for the permanent establishment of aviation schools, aviation posts, and experimental aviation stations and proving grounds for the United States Army."

(b) Act of July 2, 1917 (40 Stat., 241). This act reenacts the provisions of the act of August 18, 1890, supra, covering the acquisition of land for sites for works of fortifications and coast defenses, broadening the scope of the same to include lands required for "military training camps." It authorizes the acqui-

sition not only of title in fee, but also of any "temporary use thereof or other interest therein, or right pertaining thereto"; and authorizes immediate possession upon the filing of the petition for condemnation, waiving the requirements of section 355, Revised Statutes, as to approval of title by Attorney General, and cession of jurisdiction over the premises. This statute is eminently satisfactory so far as it applies. As passed by both branches of Congress, it included the words "and other military purposes" following the words "military training camps," but these words were stricken out in conference, thereby limiting the scope of this act to lands required "for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps."

(c) Act of July 24, 1917 (40 Stat., 243), authorizing "the acquisition of land, or any interest in land, with any buildings and improvements thereon, by purchase, lease, donation, condemnation, or otherwise," for the establishment, equipment, maintenance, and operation of aviation stations. (*Idem*, p. 245.)

(d) Act of July 27, 1917 (40 Stat., 247), authorizing the President to cause possession to be taken on behalf of the United States of the whole of North Island, San Diego, Cal., settlement to be made therefor as authorized in said act.

(e) Act of August 10, 1917 (40 Stat., 276), section 10 of which authorizes the requisitioning of "storage facilities for such supplies," i. e., supplies necessary to the support of the Army, or the maintenance of the Navy, or for other public use connected with the common defense.

(f) Act of October 6, 1917 (40 Stat., 352), making appropriation for a proving ground and authorizing the President to take over for the United States the possession and title of certain lands for said purposes. The authority so conferred is limited by the amount of the appropriation made for the purpose. Under this authority the proving ground at Aberdeen, Md., has been acquired.

(g) Section 120 of the national defense act of June 8, 1916 (39 Stat., 213), which, although passed prior to the beginning of the war, was enacted to meet war conditions, authorizes the placing of orders with manufacturing establishments for military supplies, and provides that such orders shall have precedence over prior commercial orders, and that if the manufacturing establishment refuses to fill the order the President is authorized to "take immediate possession of any such plant or plants and, through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required," etc. This statute, according to its terms, only authorizes the taking over of a plant following the failure of a manufacturer to fill the order.

(h) The following statutes may be mentioned, although they do not relate to the jurisdiction of the War Department, namely:

(1) Act of March 4, 1917 (Public, No. 391 65th Cong., pp. 28 and 29), authorizing compulsory orders for war material for ships and airplanes, the requisitioning of factories for their manufacture, limiting the authority so conferred to March 1, 1918.

(2) Act of June 15, 1917 (40 Stat., 182), under the heading, "Emergency shipping fund," vests the President with authority to issue compulsory orders for ships and materials; to requisition any plant or part thereof; and to requisition or take over the title or possession and use of any ship. The definitions of this act appear to confine its operations to the shipping program.

(3) Act of March 1, 1918 (Public, No. 102, 65th Cong.), authorizing the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire lands for the construction thereon of houses for the use of employees, and the families of employees, of shipyards in which ships are being constructed for the United States, and making appropriation to permit the exercise of the authority thus given.

6. *Insufficiency of existing legislation.*—It will be apparent that, aside from the special statutes authorizing the acquisition of particular tracts, the existing legislation is limited in its scope and is entirely inadequate to meet war conditions. If the words "and other military purposes" had been retained in the act of July 2, 1917, *supra*, this act would have met the requirements of the situation, but the elimination of these words in conference, as explained above, leaves the act applicable only where the lands are required for the purposes specified therein; i. e., for sites for works for fortifications, coast defenses, and military training camps. Where lands are required for other purposes, although the purchase may be authorized by an appropriation, and they may be urgently needed, the department has no means of promptly securing the lands where the owners will not sell them at a reasonable price. The department

therefore must do without the lands or submit to the unreasonable exactions of profiteering owners, since the delay incident to their acquisition by condemnation would preclude this method if the lands are to be available for the requirements of the existing emergency.

II. AS TO PERSONAL PROPERTY.

The only statute which authorizes the requisitioning of personal property is the act of August 10, 1917 (40 Stat., 279), commonly known as the food, feed, and fuel act. Section 10 of that act broadly authorizes the requisitioning of foods, feeds, fuels, and other supplies necessary to the support of the Army, or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, etc. This provision is contained in the food, feed, and fuel act and primarily contemplates supplies of the character therein defined as "necessaries," namely, "foods, feeds, fuel, including fuel oil and natural gas, fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel." The language of section 10, however, is susceptible of a broader meaning and may be construed as including any sort of supplies required for public use in connection with the common defense. While the question is not free from doubt, it has been so construed in practice. It may be further observed that section 120 of the national defense act of June 3, 1916 (39 Stat., 213), provides for a method of securing the manufacture of supplies by compulsory orders, giving the Government precedence over private orders without regard to the date of placing of the same. The combination of these two statutes appears to meet the requirements as to personal property; but, as explained above, the existing legislation is entirely inadequate as to real property.

Mr. GARD. Have you a copy of the bill, of 11136? Would you kindly go over it with me a minute?

Col. CALL. Yes, sir. Col. Gilbert is more familiar with the bill than I am.

Mr. GARD. Either or both of you, we would be glad for you to suggest on the bill as we go along. The bill seems to provide for means for acquiring real estate or personal property or fixed property during the present war emergency. That is the limitation of it, isn't it?

Col. GILBERT. That is correct.

Mr. GARD. "The President is hereby authorized, either directly or through such executive department or agency as he may designate, to take over for and on behalf of the United States from time to time during the present war the possession and use or ownership of any and all personal property and such use of or such right, title, and interest in and to any and all real property, or any part or portion thereof as in his opinion is necessary for the national security and defense or the conduct of the Government." That means you can take over for use or ownership any personal property or title to any real estate that the President or any executive department he may designate may think it necessary for the national security?

Col. GILBERT. It rather enlarges the power of the Executive than gives power to the executive department.

Mr. GARD. It seems to me to give to the department the same power as it does to the President.

Col. GILBERT. That he may operate through the executive department by calling upon that department or those departments to act in the premises.

Mr. GARD. Your second provision is that real estate shall be acquired through proclamation describing such real property and setting forth whether the United States takes the title in fee or a

lesser estate, and when it makes the proclamation the property then becomes the property of the United States and you may immediately enter into possession thereof.

Col. CALL. That method was authorized for the acquisition of Aberdeen Proving Grounds over here in Maryland.

Mr. WHALEY. What is the meaning of the expression "or temporary use thereof," after lesser estate?

Col. CALL. It is to cover all possible uses of real estate.

Mr. WHALEY. Just a blanket provision?

Col. GILBERT. Yes, sir. Lesser would cover rentals.

Mr. WHALEY. Lesser estate would cover temporary use, even rentals, wouldn't it?

Col. GILBERT. Yes, sir.

Mr. VOLSTEAD. In my State no estate could be taken less than leasehold.

Mr. GARD. The present law I suspect—I haven't examined it—I suspect it is that the existing law should permit the condemnation of private property for public use through the courts.

Col. GILBERT. That law is very limited, and that is the trouble the Government is finding. That is one of the reasons for presenting this bill.

Mr. GARD. What are the limitations in that that you think are insufficient to allow the Government to go ahead?

Col. GILBERT. Generally speaking, this involves real estate. The Government has the power only to take real estate for fortifications and coast defenses in connection with that, barracks and quarters—I am speaking now of the War Department and the Army—and real estate needed for rivers and harbors improvement for which provision has been made by law, and condemnation of such real estate has been authorized by Congress for public use. Then there is this act of July 2, 1917, as has been recently amended. It is not yet in published form. This allows the taking of real estate for construction, location or use for coast defense—I believe the amendment was added to cover nitrate plants and electric power needed in connection therewith.

Mr. WHALEY. Haven't you got here for storage plants and embarkation plants, also remount stations?

Col. GILBERT. I was only speaking of the fee.

Mr. WHALEY. By requisition—that is what I speak of.

Col. GILBERT. Not unless you had some special act. There is this food, feed, and fuel act, which allows you to take temporary use and lease for storage of whatever you may take under that act—food, feed, and fuel.

Mr. WHALEY. No; it must come under the urgent-deficiency bill. You take, down in my State, 2,000 acres for a remount station, storage facilities, and embarkation; they took that recently.

Col. CALL. They took that under the terms of the food, feed, and fuel act. The terms of that section seem to be more general than any other section—"or any supplies necessary for the national defense." It was necessary to construe it to include—

Mr. WHALEY. That falls under the Agricultural Department, not the War Department.

Col. CALL. Yes.

Mr. VOLSTEAD. I want to ask you a question with reference to the phrase "or the conduct of the Government," at the end of the second section. If it is taken for the national security and defense, it seems to me what you want is in aid of the Navy and Army; that would be the conduct of the war. It says, "or conduct of the Government." Anything—deepening a river, or putting up a post office, or something like that—you could take it under this. It ought to be a war power.

Mr. GARD. Have you any explanation you want to give as to section 2, that provides for the issuance of a proclamation describing the property? Does it provide for service of that proclamation on anyone?

Mr. GILBERT. No; it is just to be merely a proclamation. The proclamation itself would operate to transfer the title.

Mr. GARD. How is the person who owns the property to be advised of the proclamation? Suppose I own a piece of property, say, in West Virginia, and the Government, through some executive agency, determined that it was necessary for the national security and defense, and thereupon they issued a proclamation saying they wanted the property. Am I to be advised of that in any way?

Col. GILBERT. Just like any other proclamation that is issued.

Mr. VOLSTEAD. You have got to take notice of it.

Mr. GARD. I was wondering if you intended to provide for any notice of it?

Col. GILBERT. We do not intend for the act to provide for specific notice.

Mr. WHALEY. I notice you haven't got any time in there.

Col. GILBERT. We expect it to act like that—instantly.

Mr. WHALEY. They could take over any of those apartment houses here and turn us all out to-day. That is a little strong, isn't it?

Col. GILBERT. I don't think so.

Mr. WHALEY. Under this thing they could notify you to get out of any one of these apartment houses here to-morrow and the Army walk in, throw your stuff out in the street. They are not going to do it, but under this thing they could do it. Suppose they go into a city, for instance, not expecting them in there, and would say, "We take all these houses under this proclamation." without any notice. That is unreasonable.

Col. GILBERT. I will say with respect to that, in drawing the act it was drawn that way intentionally and after considerable thought. It oftentimes is necessary that the Government shall have a thing quick, at this time, as it is necessary that it shall have it at all, and to impede it at all is to lessen its efficiency, and one of the objects of this bill was to provide a quick method of acquiring such property as was necessary to have.

Mr. GARD. This third section states that notice shall be given where personal property is intended to be acquired by written requisition, notice served upon the owner or owners thereof—line 21.

Col. GILBERT. Yes.

Mr. GARD. There is no such notice called for in section 2; I was just calling your attention to that, whether it is advisable to do it or not.

Col. CALL. It was because section 2 was by proclamation and this is by requisition.

Mr. WHALEY. It says:

Immediately upon such promulgation of such proclamation such title to or interest in or use of real estate as is described and defined by said proclamation shall vest in and become the property of the United States, and it may immediately enter into the possession thereof.

Mr. GARD. Provided the executive department makes the proclamation. Say they make a proclamation saying the property at 1452 F Street—if there is such a number—is necessary for national security and defense.

Col. GILBERT. I think not. I think, generally speaking, a proclamation is regarded as something for the President to issue.

Mr. GARD. It don't say so.

Col. GILBERT. The President took over the railroads, for example, in obedience to law, and he recited he did it through the War Department.

Mr. WHALEY. The law provided he did it through the War Department.

Mr. GARD. When you get down to the individual cases like a piece of real estate the President wouldn't issue a proclamation at the time, he would delegate that to some executive head. That would be the danger of it I would see. Some executive head might run rampant over taking a man's property for unnecessary purposes. I can see that some law of this kind is necessary. You have got to recognize the discretion of some one. Maj. Neely has suggested that so far as he has read there is nothing in the law about any appeal.

Mr. WHALEY. That isn't necessary. But I do think it ought to have some notice when a person's property is going to be taken over. It is all right to say he can't have a hearing, that that property shall be taken, but I think it is going a little strong to issue a proclamation that you will take his property over to-day—you will take it over this afternoon or to-morrow morning. Provide 10 days before the promulgation of this notice. You may disrupt his own business, whereas if he has got an opportunity to make other arrangements he may preserve his business.

Mr. GARD. Section 5 provides for payment of a compensation and provides the value of the property is to be determined by an appraiser appointed by the President or head of the executive department, and if he doesn't accept that valuation he shall be paid 75 per cent of the appraisal and be entitled to sue the United States to recover such further sum as to make up the amount of such compensation therefor.

Mr. WHALEY. That is different from the other requisition. The act providing for the requisition down here at Queenstown, provided for the appraisement and payment of 75 per cent of that if they didn't want it.

Mr. GARD. That is what I was going to suggest, to provide for one appraiser to be appointed by the President, one by the executive department, and one by the property owner.

Col. GILBERT. I think it is necessary for swift action that the President shall appoint the appraiser, that there shall be nothing to delay this action, that there is ample and full protection by and through the provisions of section 5. If the amount of the appraisal is not satisfactory he does not have to accept it. He will receive 75 per cent of that appraisal in cash and then he may sue for the

balance that would make up the difference between actual value, if he was able to prove it, and the amount of the appraisal. That is a method that has received the approval of Congress in two or three different acts that have already been passed.

Mr. WHALEY. Would the Government appoint all the appraisers?

Col. GILBERT. Yes; ordinarily it would have been the President—such amount as the President determines. In two or three acts it is used that way, nothing more definite, assuming, of course, that the President would act through some one else in making the determination. There is one act, section 120 of the national-defense act, which is so indefinite that there is no method whatever defined in determining the values. There is only a provision that the party shall have just compensation.

Mr. WHALEY. That throws him into court?

Col. GILBERT. Well, there is a provision in there about the President paying for it.

Mr. VOLSTEAD. Haven't they got a provision in there that if he isn't satisfied with that suit may be brought?

Co. GILBERT. Not in the national-defense act.

Mr. VOLSTEAD. You can sue the United States Government under express authority.

Mr. WHALEY. Going back to line 10, section 2, do you think the Government could possibly suffer by amending the section by writing in at the beginning of line 10, section 2, "At the time fixed by said proclamation, which shall be at least twenty-four hours after the promulgation thereof, such title," etc.? In other words, it would give the occupant 24 hours. Take my own case; if I had a sick child in my house and some fellow comes along and says get out to-day, it would be a very embarrassing case for a man.

Mr. VOLSTEAD. A man wouldn't want to be a trespasser on the Government's property.

Mr. WHALEY. Of course these gentlemen wouldn't do it; but some of them get puffed up over their authority, and I don't think some of them would hesitate to put a man's sick wife and child outdoors if they had authority to do it.

Col. GILBERT. That would be all right. Sure. If a longer length of time I would hate to see it put in there.

Mr. GARD. If it was to be any time, it should be longer than 24 hours I think. It should either be in the discretion of the honest officer or some statutory limitation.

Mr. VOLSTEAD. Of course in a time of war like this the time ought not to be of such great importance that a few days would amount to anything.

Col. GILBERT. That is simply the time fixed in the proclamation.

Mr. WHALEY. That would be all right. Let the President fix the time in the proclamation.

Mr. NEELEY. The President won't have anything to do with this.

Mr. WHALEY. He would have something to do with it after the first drastic action.

Mr. VOLSTEAD. He would have to issue a proclamation. He wouldn't want to put any 24 hours on there unless there was some necessity for it.

Mr. WHALEY. After the time stated in the proclamation.

Mr. NEELEY. Or at such future time as may be stated in the proclamation.

Col. GILBERT. And upon the date named in such proclamation such title to be, etc.

Mr. VOLSTEAD. I would rather put it as to the possession instead of title.

Col. GILBERT. You put in down here and instead of saying "may immediately enter into possession thereof" you want it "at the date fixed in such proclamation"?

Mr. GARD. What is this in section 10. What is the suspension of section 355—I haven't the statute before me.

Col. CALL. That statute requires two things—that the title be approved by the Attorney General and jurisdiction over such lands ceded by the State. It suspends two requirements, one is the approval of title by the Attorney General, and the other is cession of jurisdiction by the State in which the lands lie. That section prohibits the expenditure of any public money acquired for the use of the United States until the Attorney General has proved the title and the State has consented to the purchase; that is, has ceded jurisdiction.

Mr. GARD. This bill retains the approval of the Attorney General.

Col. CALL. The title would be taken over by proclamation itself.

Mr. GARD. The money wouldn't be paid until it is approved.

Col. GILBERT. Yes.

Mr. VOLSTEAD. You have got to know that he has got title when he pays the money.

Col. GILBERT. The rule is that the money is only to be paid upon the Attorney General's approval of the title, and so it would suspend it so far.

Mr. WHALEY. All you do in that case is to waive that requirement of the State to ceding jurisdiction.

Mr. GARD. What provision is there in this bill for the protection of the holder of a mortgage on some real estate? Suppose I hold a first mortgage on some real estate here in Washington and the Government comes in and takes the fee title.

Col. GILBERT. That is covered by section 5.

Mr. VOLSTEAD. It makes the mortgage due, practically, whether it is due or not.

Col. GILBERT. Where it can not be safely paid, then it goes on and makes provision about paying it into court.

Mr. GARD. Is it intended to have this law operate beyond the continental limits of the United States so as to include the territorial United States?

Col. GILBERT. Well, as drawn it would operate coextensively with the territorial jurisdiction of the United States.

Col. CALL. The question arose the other day about leaseholds' interests for storage purposes in Hawaii. It wouldn't operate in the Philippines.

Mr. GARD. It should be made that way, I should say, if there is any necessity for it, and as a safeguard I should say that it should include the Philippines and Panama Canal and such other things as is held to be necessary.

Mr. WHALEY. Is there anything in it to protect a man where you don't fix price by the President, but would buy it outright to protect the mortgagee?

Col. GILBERT. No; if you were buying it outright, you wouldn't be buying it under this act.

Mr. WHALEY. I know, if you were buying it outright. Suppose you have a case where you don't have to fix the price by the President, they accept the price that has been fixed, the money may be paid to the owner. There may be a mortgage in there. Where is he protected—the holder of the mortgage?

Col. GILBERT. The Government must protect itself against the mortgagee in that case, because the Government is given the option when there is any question whatever about title to pay the money into court instead of paying it over to the supposed owner.

Mr. WHALEY. I was just thinking maybe that is the reason that provision of the Attorney General was put in there. I don't know. You have got it provided for where the 75 per cent is to be paid, but haven't got it provided for in the other case.

Col. CALL. You couldn't pay the money without an abstract of insured title.

Col. GILBERT. I have not called your attention to several matters that we regard down there as the necessities for the bill.

Mr. GARD. You better state that.

Col. GILBERT. I am not sure but that all you gentlemen can see this matter as I do, and as those of us do who are having to deal with it. I mentioned, and Col. Call has mentioned, the legislation under which we are proceeding to get real property. I think it might be proper to call your attention more fully to the situation with reference to the acquisition of personal property. There are possibly two acts under which the Government may take personal property even for war purposes. One is section 120 of the national-defense act. It may place orders with manufacturing concerns and only from them, and demand preference on those orders. Aside from that the only means the Government has for acquiring personal property is under provision of section 10 of the food, feed, and fuel act. Col. Call has called your attention to the fact that that is quite limited. It covers, food, feed, and fuel, but it also uses the expression "and other things needed"—I forget the exact language, for the uses of the Army and the Navy. You readily see by that language there is growing up a very positive and perhaps successful contention that the word "other" has got to be construed as meaning of like character with food, feed, and fuel, and therefore you see what a limited field the Government is put in when it desires to requisition any personal property.

Mr. VOLSTEAD. Of course you have got another, you can take ships?

Col. GILBERT. Yes; we can take ships. I was thinking of things on land.

Mr. VOLSTEAD. I suppose that is personal property.

Col. GILBERT. Yes; it is personal property, that is true, but I was speaking of something more strictly movable than that.

You can readily imagine that the War Department is in need of using requisitions for a great many different kinds of personal property and it is operating to-day under that very limited section, and

it is having to scheme and connive and forge a reason out some way that it can make progress, do the things that are absolutely necessary to do, and yet keep within the law and the limitation laid down by that section of the statute.

Without going largely into details that indicates the extent of the situation under which the Government is laboring for having some kind of an instrument whereby it may proceed with some ease and some dispatch and some feeling of certainty for the acquisition of personal property.

As to the uses of real property that is a field in which the Government is very much hampered. It has no means of acquiring temporary use of real property except under the act of July 2, 1917, which was recently amended and which is very much circumscribed and under the provisions of section 10 of the food, feed, and fuel act which gives it the right to requisition real estate for storage of the things it may take under that act, namely, food, feed, and fuel, so when it gets outside of the range of storage facilities it can only take the temporary use of the things covered in the act of July 2, 1917, and that is for fortification, coast defenses, military training camps, nitrate plants, and, I think, electric plants to be used in operation therewith.

So you see the Government to-day if it wants to rent a building it has got to rely upon private contract. As an instance at hand the Medical Department is sorely in need to-day of a hospital in certain sections. It can not get it under any law that exists, and unless this law be passed if it ever gets this hospital it will have to get a special act of Congress in order to enable it to do so.

Take the question of storage for automobiles, for example. The Government in its war operation has much need of automobile storage. How are we going to furnish it. I know of no way under the existing law. So it appears really that the Government is in worse position with respect to acquisition of personal property and with respect to acquisition of temporary use of real estate than anything else because those are the things that it most frequently wants to acquire. Where it wants to acquire real estate the conditions don't happen there as frequently, but the means that are at its disposal—I may add that this act has endeavored and, if passed, would harmonize the procedure to be followed in all cases.

There is much diversity of proceedings provided for under the present law as going through the old method of condemnation; then where the 75 per cent clause is put in, 75 per cent of the appraised value being paid and sue for the balance. In some cases Congress has provided that that suit may be brought in the district court where the value does not exceed \$10,000, and if the valuation exceeds \$10,000 it may be brought in the United States Court of Claims. In other cases it is provided that it must be brought in the United States Court of Claims regardless of the amount. If those were followed you would have to follow the method of procedure, but, as I say, I think this bill would harmonize it all because procedure would be under this bill and there would be a uniform method.

Mr. WHALEY. Under the reading of this bill as regards personal property it would be construed as a price-fixing measure.

Col. GILBERT. Yes; the Government would primarily fix the price. Secondarily, the courts would fix the price.

Mr. VOLSTEAD. Let me ask you. It is an additional act; that is, it is an act in addition to the existing act. Of course it is broad enough to cover anything, but suppose here is a piece of property you are taking for any specific purpose for which there is now a specific law. Will you take it under this act or would you have to take it under the existing statute?

Col. GILBERT. The section to which you refer was placed in this act for the purpose of making it possible to take under this act instead of some previous provision of law. It was intended to be sufficiently broad in its scope to cover that.

Mr. VOLSTEAD. It is a question in my mind whether it does. I am just reading it over hastily.

Col. GILBERT. Which section is that?

Mr. VOLSTEAD. Six. Would this supersede, for instance, the provision under which the railroads have been taken over?

Col. GILBERT. Wouldn't this clause cover the thing you mentioned, "and any appropriations heretofore or hereafter made that are available for the procuring or purchase of real or personal property may likewise be used in making payment for such property when acquired under the provisions of this act"?

Mr. VOLSTEAD. I don't think that would change it. We could at least modify it.

Col. GILBERT. It is very desirable that the language shall be broad enough to cover that purpose, and it was my intention to cover it.

Mr. VOLSTEAD. Broad enough so we might proceed under this act and disregard the other act, but this is not intended to repeal the other act in any way, but simply to add an additional power?

Col. GILBERT. That is all. That is the exact intention of the section.

(This concluded the hearing on H. R. 11136.)

TO PROTECT CITIZENS AGAINST LYNCHING

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HEARING Copy _____ 1966

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-FIFTH CONGRESS

SECOND SESSION

ON

H. R. 11279

Serial 66

STATEMENTS OF MAJ. J. E. SPINGARN AND CAPT.
GEORGE S. HORNBLOWER

JUNE 6, 1918



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COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-FIFTH CONGRESS.

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L. C. DYER, Missouri.
JOSEPH WALSH, Massachusetts.
CHARLES F. REAVIS, Nebraska.
WALTER W. MAGEE, New York.

A. L. QUICKEL, *Clerk*.

TO PROTECT CITIZENS OF THE UNITED STATES AGAINST LYNCHING IN DEFAULT OF PROTECTION BY THE STATES.

SERIAL 66.

COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, *Thursday, June 6, 1918.*

The CHAIRMAN. There are present two gentlemen from the War College who have been invited by Mr. Dyer to discuss a bill which he introduced.

Mr. DYER. Mr. Chairman, there are two gentlemen here, Maj. Spingarn and Capt. Hornblower, and they desire to present some facts in regard to this proposed legislation to protect citizens of the United States against lynching, etc.

STATEMENTS OF MAJ. J. E. SPINGARN, UNITED STATES INFANTRY, R. C., MILITARY INTELLIGENCE BRANCH, EXECUTIVE DIVISION, GENERAL STAFF, AND CAPT. GEORGE S. HORNBLOWER, UNITED STATES NATIONAL ARMY, MILITARY INTELLIGENCE BRANCH, GENERAL STAFF.

The CHAIRMAN. Major, we will be glad to hear you.

Maj. SPINGARN. Mr. Chairman and gentlemen of the committee, the attention of the Military Intelligence Branch was called to Representative Dyer's bill, H. R. 11279, by reason of the fact that our branch has evidence of a great deal of bitterness among the colored

people as a result of lynching, and, as a part of the military statesmanship of the General Staff, it was thought necessary that some kind of counter offensive should be started against this disaffection by having some such bill passed. There is no question, so far as we are concerned, of the disloyalty of the colored people, but there is an unusual amount of bitterness which is spread by some 200 colored newspapers, most of which are absolutely unknown to the white people of the country; but these newspapers are read not only by colored civilians, but also in the Army camps by the colored soldiers, and the colored soldiers have more time to read now than they ever had before. This bitterness is also spread from mouth to mouth.

Mr. WHALEY. Where is this disaffection, or where do you find it mostly?

Maj. SPINGARN. It is virtually everywhere. I was going to read a number of reports from all over the country, but Representative Dyer tells me that you can only give me 10 minutes.

Mr. LGOE. I suggest that we have an executive session if the major is going to disclose some secret facts in the possession of the military authorities.

Mr. GARD. Do you want to have this an executive session?

Maj. SPINGARN. This information may be so worded that there will be nothing about it that need be kept private.

Mr. WALKER. Have you gone into the constitutionality of this proposition?

Maj. SPINGARN. Capt. Hornblower, of the Military Intelligence Branch, has done that, and if you will give him the time he will discuss that thoroughly. Now, as I said, we believe that the way to counteract this bitterness is not by suppressing newspapers, but by a counter offensive which would strike at the cause of the disaffection, and so our attention was attracted to the Dyer bill. We found, however, that the Dyer bill was based on the fourteenth amendment of the Constitution, or, in other words, that it was not a war measure, and our interest in this matter is entirely military. We wish to have an antilynching bill passed, because lynching may be regarded as interfering with the success of the United States in the war.

Mr. REAVIS. Why would that interfere with the success of the war any more than the commission of murder by any other method?

Maj. SPINGARN. I was coming to that. Capt. Hornblower, of the Military Intelligence Branch, was requested to draw a bill based not on the controversial fourteenth amendment but on the war powers granted by the Constitution. We approve the principle of the Dyer bill, and something of that sort ought to be enacted, but we think that we have substituted for it something which is more available at this time, because it is distinctly and only a war measure, intended to accelerate the prosecution of the war, and nothing else. Therefore this tentative draft was made by Capt. Hornblower, which reads as follows:

A BILL To punish the crime of lynching in so far as such crimes tend to prevent the success of the United States in war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the United States is at war whoever shall participate in any mob or riotous assemblage whereby death or mortal injury is intentionally caused to any man or woman employed in the service of the United States, or any man liable to service in the military forces

of the United States under the act approved May 18, 1918, entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States," or under any present or future statute of the United States or any person held under arrest by or as a prisoner of or in interment by the United States, or the wife, husband, brother, sister, father, mother, son, daughter, uncle, aunt, nephew, niece, or first cousin, whether of the whole blood or half blood, of any person in the military or naval forces of the United States or liable to service therein, as aforesaid, shall be deemed guilty of a capital offense against the United States and shall upon conviction be punished in accordance with the punishment prescribed for the crime of murder under the United States Criminal Code.

Mr. WALSH. May I ask you a question at this point?

Maj. SPINGARN. Certainly.

Mr. WALSH. Suppose, for instance, there is a colored person in the United States Army and in camp now, and a crowd should assemble and get by the guards and take that colored person out and hang him to a tree. Do I understand that the Government would be without authority to punish those people at the present time?

Maj. SPINGARN. The Government has authority to punish the crime that would be committed in that particular case, but suppose—

Mr. WALSH (interposing). Suppose a young man were walking up yesterday to register, and as he came out, after he had registered, he was seized and lynched. Would the Government be without authority to punish the people who lynched him?

Maj. SPINGARN. I will refer that question to Capt. Hornblower.

Capt. HORNBLOWER. I am afraid that the difficulty about that is that the statute which would cover that offense would not impose adequate punishment.

Mr. WALSH. Would not that be interfering with the recruiting of the Army?

Capt. HORNBLOWER. Perhaps so, but the penalty is only six months' imprisonment.

Mr. REAVIS. If it be true that the Government has no jurisdiction over an offense of that kind, then by what authority does the War Department consider those boys who register as deserters if they do not show up in the draft? If they are not in the drafted Army from the time that they are registered, so as to make crimes committed against them amenable to the Federal law, then by what authority does the War Department consider them in the Military Establishment to the extent of considering them as deserters when they do not appear?

Capt. HORNBLOWER. My opinion is that they are not considered as deserters until they have actually been inducted into the military service. They are considered to be draft evaders under a special provision of the selective-draft act if they fail to appear. That is their status from the time they are registered until they are inducted into the service if they fail to respond to the summons, but there is a clear distinction between a man's status between the time he is registered and the time he is inducted into the service and his status after he is inducted into the service.

Mr. REAVIS. If the War Department does not consider a registered man as a part of the Military Establishment, upon what theory of the Constitution would you make murder committed on him a Federal offense?

Capt. HORNBLOWER. On the theory—

Mr. REAVIS (interposing). On the theory that he might at some time in the future become a part of the Military Establishment?

Capt. HORNBLOWER. Upon the theory that the power to raise and maintain armies carries with it power to punish those acts which interfere with the raising and maintaining of armies. It is the same power that you gentlemen exercised when you made it a Federal offense to encourage a man not to register, and which authorizes you gentlemen to make it a Federal offense to murder a man who is about to register.

Mr. REAVIS. Let us for the moment eliminate from the discussion the idea of lynching him by violence. Let us suppose there is an affray participated in by a man who has registered and another citizen of the Republic, and the man who registered is killed. Do you think that under the Constitution you could make that act punishable under the laws of the Federal Government?

Capt. HORNBLOWER. If it was in time of war, then, as a part of the war powers conferred by the Constitution, I think it could be, just as I think it was constitutional for you gentlemen to provide those other measures under the war power.

Mr. REAVIS. I will be very much interested in hearing your argument on that proposition.

Capt. HORNBLOWER. I had better wait until Maj. Spingarn completes his statement.

Mr. THOMAS. Who drew that substitute bill?

Maj. SPINGARN. Capt. Hornblower, of the Military Intelligence Branch.

Mr. THOMAS. Is he a lawyer?

Maj. SPINGARN. Yes, sir; or he was once.

The purpose of this bill is, first, to defend soldiers. Obviously, any man who kills a soldier is interfering with the prosecution of the war. In the second place, its purpose is to defend the potential soldier. Every man who in any way interferes with or reduces the possible military personnel or matériel of the Nation is in some measure interfering with the prosecution of the war. In the third place, the purpose of the bill is to protect the families of soldiers or potential soldiers. The reason for that is plain: The Government has accepted the principle that a soldier can not fight properly or efficiently if he is worrying about the condition of his family at home. The Government has proved its acceptance of that principle by the enactment of the war-risk insurance bill and other measures, whereby the soldier is required to allot a certain part of his pay to his family, and whereby the Government itself allots certain sums of money in addition to the family of the soldier, and whereby the Government does everything in its power to see that the dependents of the soldiers shall be taken care of. In the same way, and according to the same principle, the Government should protect the families of soldiers and potential soldiers in order that the soldier himself shall not be worried about his people at home, but shall be able to give his whole attention to the war.

Mr. THOMAS. Do you think that a soldier, or a potential soldier, as you call him, if he himself obeys the laws, is in any danger of being lynched anywhere?

Maj. SPINGARN. His family may be lynched while he is away.

Mr. THOMAS. If they obey the laws?

Mr. SPINGARN. I am not able to sift all the evidence in the 3,000 cases of lynching that have occurred since 1885, but, in many cases, at least, I think that some of the men lynched have not disobeyed the law.

Mr. DYER. At any rate, a man who is lynched is certainly not punished according to law.

Maj. SPINGARN. Exactly.

Mr. DYER. There is no law that I have ever heard of that authorizes lynching in this country, no matter what a man does or does not do.

Mr. THOMAS. In many cases it should be done. I think that a man who is guilty of rape should be lynched.

Mr. REAVIS. The bill proposed by you would punish under Federal law the murder of one who happens to be the cousin of a man who might at some time in the future be a soldier, would it not?

Maj. SPINGARN. That is very true.

Mr. REAVIS. Do you think that could be done under the Constitution of the United States?

Maj. SPINGARN. Yes, sir; under the war powers granted by the Constitution.

Mr. DYER. I will say to the gentleman from Kentucky that the records, the undisputed records, of lynchings during the last 10, 15, or 20 years show that in not 10 per cent of the lynchings was there even any charge of rape, so that that argument does not hold very good.

Maj. SPINGARN. We have no desire to raise the controversial question of lynchings in the past. Our whole purpose is to make the prosecution of the war more effective by stopping something which will interfere with the prosecution of the war or with the peace of mind of those engaged in the prosecution of the war. The Government's attempts throughout to protect the soldiers against such worries have been continuous, and not only is the principle just, but since the Federal Government—and not the State government—takes the soldier away and, in so far as he is taken away, withdraws that man's protection from his family, we believe it is the Federal Government's duty to provide for the protection which that man, in his absence, can not give to his family. That is the justification for including the family.

Mr. THOMAS. Has that bill ever been submitted to the President?

Maj. SPINGARN. No; it has not.

Mr. WALSH. Has this unrest, which you say has been aroused, resulted in any cases of insubordination on the part of these soldiers?

Maj. SPINGARN. There have been a few cases of insubordination on the part of soldiers, but I am particularly interested in the effect of the disaffection outside of the Army.

Mr. WALSH. What is the need, then, if it is simply to protect the family of the soldier, to provide for all these various relations? Why not make it the wives, children, or dependents? What is the need of putting in the uncle, the aunt, the cousin, the nephew, and niece?

Maj. SPINGARN. Your suggestion is a very good one. What we are after is the principle of protecting the soldiers.

Mr. MORGAN. Has the War Department any evidence, since the beginning of the war, that there has been any increase in the number of lynchings?

Maj. SPINGARN. I have reason to believe 212 lynchings of colored people have taken place since this country declared war against Germany.

Mr. MORGAN. Does the evidence show, since these colored men have been taken in as soldiers in the National Army or by enlistment, that these lynchings have been caused by prejudice and because they have become soldiers, or anything of that kind?

Maj. SPINGARN. I should say that it does. I will read one expression.

Mr. MORGAN. These 212 lynchings have not been of soldiers?

Maj. SPINGARN. No; the lynchings of civilians.

The CHAIRMAN. Mr. Morgan asked whether those lynchings had taken place because the men had become soldiers or whether the present lynchings had anything to do with the Government at all?

Maj. SPINGARN. No; the lynchings had nothing to do with the fact that the men were to become soldiers.

Mr. MORGAN. I wanted to ascertain whether the fact that the colored people were becoming soldiers had increased the number of lynchings.

Maj. SPINGARN. I can not express any definite opinion on that subject. I would like, however, to read a quotation—

Mr. THOMAS (interposing). Before you read that I would like to ask Capt. Hornblower a question. Captain, I understand you drew this bill?

Capt. HORNBLOWER. Yes, sir.

Mr. THOMAS. You claim it to be constitutional?

Capt. HORNBLOWER. I think it is; yes.

Mr. THOMAS. I do not wish to ask an impertinent question at all, but I would like to know your age and how long you have practiced law?

Capt. HORNBLOWER. For 10½ years.

Mr. STEELE. Have you prepared a brief on this question?

Capt. HORNBLOWER. No; I prepared this draft very hastily and in connection with a great deal of other work.

Mr. DYER. Let me state, for the benefit of Mr. Steele and the other members of the committee, that it was not expected at this time to have a hearing upon this bill nor upon the constitutionality of it. I will be fully prepared, as soon as the opportunity is presented later on, to present the legal aspect through lawyers of ability and who have studied this thoroughly. These gentlemen are here simply for the purpose of presenting the importance of some bill along this line as a war measure, but not in regard to any special bill.

Maj. SPINGARN. Let me say that I am not a lawyer.

Mr. DYER. They are presenting it as a war measure.

Mr. IOOE. I suggested a few moments ago that perhaps an executive session would be better. The reason for that was that I wanted to find out whether this matter had been discussed particularly at the War College. Is this the individual interest of yourself and Capt. Hornblower, or is it a matter that has been taken up officially there and is it a matter which the officials at the War College feel should be brought to the attention of this committee? Has that been discussed?

Maj. SPINGARN. I am not authorized to say what takes place inside of the military intelligence branch.

Mr. IGOE. The reason I asked for an executive session was because it is a matter of very great importance to me personally if the officials there feel that some legislation of this kind is necessary; and, if that is so, I think the committee is entitled to have the views of the officials at the War College.

Mr. STEELE. You could state whether or not this bill has the sanction of the War College.

Maj. SPINGARN. My presence here has the sanction of the Military Intelligence Branch of the General Staff.

Mr. STEELE. And you are speaking for that branch?

Maj. SPINGARN. For that branch; yes, sir.

The CHAIRMAN. Who composes that branch?

Maj. SPINGARN. All officers engaged in military-intelligence work.

The CHAIRMAN. Who is the head of it?

Maj. SPINGARN. Col. Van Deman was the head until a few days ago, and he has been succeeded by Col. Churchill.

The CHAIRMAN. How many men are engaged in this service, if you know?

Maj. SPINGARN. In the intelligence service?

The CHAIRMAN. Yes.

Maj. SPINGARN. I should say about 130.

Capt. HORNBLOWER. I do not know how many men are in the service throughout the country generally, but we have about 140 officers in Washington connected with this branch.

The CHAIRMAN. Do you mean to say that these officers have gotten together and passed upon this matter?

Capt. HORNBLOWER. No, sir; that is never the way a thing works in the Army. Maj. Spingarn, who had been in command of a battalion of infantry at one of these cantonments, and who had to undergo a surgical operation and therefore was transferred to this branch, was ordered by the chief of this branch to look into this question of negro subversion, which is one of the subjects that falls within the jurisdiction of the chief of this branch. That is a part of what we call the negative intelligence work, the countering of the enemy's efforts. The Secretary of War directs the Chief of Staff to counter the enemy's secret efforts in this country; the Chief of Staff directs the Chief of Military Intelligence to do so and the Chief of Military Intelligence appoints his officers and orders them to take charge of this or that particular feature of it. He ordered Maj. Spingarn to take charge of this because of the major's special qualifications for studying this subject. Then he approved the major's plans in regard to countering the enemy's propaganda on this subject.

Mr. IGOE. Then you gentlemen are here officially representing the branch of the Army which has charge of this particular subject?

Capt. HORNBLOWER. Yes, sir.

Mr. IGOE. And you are speaking for that branch of the service?

Capt. HORNBLOWER. That is my understanding. Is not that true, Major?

Maj. SPINGARN. I think so.

Mr. MORGAN. It is understood that you were to come before the committee and present the matter by your superiors?

Maj. SPINGARN. I have the permission of my superiors to appear here.

Capt. HORNBLOWER. And I am here under Maj. Spingarn's orders, and simply acting as his assistant.

Mr. THOMAS. Capt. Hornblower is the author of this bill. He seems to be a very intelligent gentleman; he has had 10½ years' experience in the practice of law and ought to be amply qualified, and I take it is, to discuss this question from the constitutional standpoint. He claims it is constitutional. At first glance I do not believe it is constitutional. So far as I am individually concerned I am willing to do anything or vote for any sort of a bill in order for us to win this war. That is the first thing. I think that Capt. Hornblower ought to file a brief discussing the constitutionality of this question, and I would be glad if he would do so.

Capt. HORNBLOWER. I will be very glad to do that, sir.

Maj. SPINGARN. Capt. Hornblower will present a brief on the constitutionality of the bill at a later meeting, if you will permit him to do so.

Mr. DYER. I move, Mr. Chairman, that the brief to be presented by Capt. Hornblower at the request of a member of the committee, the gentleman from Kentucky, be printed in the hearings and in the proceedings.

Mr. GARD. There is no objection to that on the part of any members of the committee, I assume, or to anything that these gentlemen want to incorporate in their statements.

Mr. THOMAS. What State are you from?

Capt. HORNBLOWER. New York.

Maj. SPINGARN. Do you wish me to read some of the evidence which I have or do you wish me to simply incorporate it in the record?

Mr. IGOE. Is there anything confidential about it?

Maj. SPINGARN. No; it has been expurgated so that nothing is left in the evidence that is confidential.

Mr. IGOE. I suggest that the evidence be incorporated without reading it.

Mr. GARD. You might read one statement, so that we will know something about it.

Maj. SPINGARN. Here is the sort of report that has come to my attention:

Mr. and Mrs. ———, of ———, state that their colored maids are demoralized by reports of treatment of negroes here and abroad. Their friends state that this condition is general in this neighborhood.

Mr. GARD. Where is that from?

Maj. SPINGARN. I can not tell you.

Mr. IGOE. What do they mean? What kind of treatment?

Maj. SPINGARN. Well, in most of these cases the apparent source of demoralization is the question of lynching.

Mr. GARD. But they do not lynch them abroad?

Maj. SPINGARN. No; but German agents have apparently circulated rumors regarding the treatment of colored troops abroad. Of course, these rumors are absolutely false.

Mr. IGOE. I have had a complaint from a man in the service in regard to the treatment of negro troops, the complaint being that colored men of college education are not given any opportunity whatever of being assigned to colored regiments where their education

would fit them for certain noncommissioned ranks or better. Would that be sort of complaint that was mentioned in that communication?

Maj. SPINGARN. No. The rumors that are spread in regard to the treatment of colored troops abroad are false, and they are of such a character that we do not care to have them spread further. These rumors have been spread throughout the country apparently by German agents, and are to the effect that our colored troops are being treated badly abroad, but, of course, the rumors are false. Here is another of our reports:

It is reported that the negroes of this city are considerably worked up over the recent killing of W. F. and a negro named B., and that one or more negro preachers asked on H. on the occasion of his recent address in behalf of the Red Cross, how much longer they would have to stand such treatment, declaring that they were shot down in cold blood, like dogs.

These are simply a few of the hundreds of reports that come in to us. Here is an article published in a negro magazine. The article is extremely bitter, but it expresses the feeling, apparently, of a great many colored people about lynchings. Do you want me to read that?

Mr. LGOE. You may proceed.

Maj. SPINGARN. The point which this article wishes to make is that, whereas the 13 negroes who participated in the Houston riot were immediately executed, thousands of the black race have been lynched and few, if any, white men have paid the penalty for it by death. I am not trying to justify the statement, but I am quoting it to explain their reason or basis for the bitter feeling of the article. The article in the colored paper is entitled "Thirteen," and reads as follows:

They have gone to their deaths. Thirteen young, strong men; soldiers who have fought for a country which was never wholly theirs; men born to suffer ridicule, injustice, and at last death itself. They broke the law. Against their punishment, if it was legal, we can not protest. But we can protest and we do protest against the shameful treatment which these men and which we, their brothers, received and our children await; and, above all, we raise our clenched hands against the hundreds of thousands of white murderers and scoundrels who have oppressed, killed, ruined, robbed, and debased their black fellow men and fellow women, and yet to-day walk scot-free, unwhipped of justice, uncondemned by millions of their white fellow citizens, and unrebuked by the President of the United States.

We have a great many articles following that general tone. Now, it is easy to suppress magazines of that sort, but that is not getting at the cause, and it would be much easier to get at the cause by enacting a statute against lynching and enforcing it. That is the reason we are interested in it. We are interested in preserving the morale of the colored people in the prosecution of the war.

Mr. VOLSTEAD. Is there any State that does not have a law against lynching? Of course, every State in the Union has a law against lynching, and I suppose the penalties are just as severe as those proposed here. Still, at the same time, I suppose it is the belief that they could be reached better by having the Federal Government go after them.

Maj. SPINGARN. We think so.

Mr. VOLSTEAD. Have you some such provision in your bill as Mr. Dyer has, making the community liable?

Maj. SPINGARN. We have no desire to take a stand as to the method by which this should be done. What we wish to call to the

attention of the committee is the military necessity of some sort of antilynching measure.

Mr. MORGAN. Is it your theory that lynching is what develops the disaffection or dissatisfaction you have referred to among the colored people?

Maj. SPINGARN. Here is one of our reports on a colored magazine:

There are articles therein which tend to incite the Negro race in this section against the white people, and the magazine is made up mostly of articles on lynching negroes in the South. This magazine is distributed freely by the colored Y. M. C. A. at Camp ———.

Mr. IGOE. I suppose you take steps to suppress literature that is being circulated in the Army that has the effect of causing dissension in the ranks. I suppose you take some steps to eliminate any such thing as that.

Maj. SPINGARN. It is a part of the work of the military intelligence branch to suppress seditious literature, or literature that destroys the morale of our soldiers or civilian population.

Mr. IGOE. Let me ask you this question: Have you considered the other side of this question, and that is the possible resentment on the part of States against a law which might interfere with the jurisdiction of the State courts in the prosecution of crimes?

Maj. SPINGARN. Well, sir, in answer to that I should say, first, that it was to avoid any semblance of such action or any semblance of the idea that it was directed against any section or State that the bill was drafted under the war powers and not under the fourteenth amendment.

Mr. IGOE. I understand what you tried to do, but I was just wondering whether the officers gave any consideration to the effect of an act of this kind upon public sentiment.

Maj. SPINGARN. In the second place, lynching is not by any means a sectional matter. Lynchings have occurred in the North as well as in the South. There have been lynchings in the States of Pennsylvania, Illinois, Indiana, and in various other Northern States.

Capt. HORNBLLOWER. May I ask leave to prepare a brief on the bill modified as suggested by the gentleman who sat over here? I think that such a modification would meet with the approval of Maj. Spingarn.

Mr. GARD. What modification was it?

Capt. HORNBLLOWER. As modified the bill, after the clause relating to any person held under arrest by or as a prisoner of or in internment by the United States, etc., would read as follows:

or the dependent wife, brother, sister, father, mother, son, daughter, nephew, or niece, whether of the whole blood or half blood, of any person in the military or naval forces of the United States or liable to service therein, as aforesaid, shall be deemed guilty of a capital offense—

etc., omitting, in other words, those relatives of the persons in the service who might be regarded as outside of the scope of the protection of the Federal Government. If you gentlemen approve, I will confine my brief to a discussion of such a bill as that, because what we are after, as has been stated by Maj. Spingarn, from whom I take my orders in this matter, is to be able to say to a very large class or a large number of fellow citizens who are being called into the service of the United States, and who now feel that they do not get the protection of the United States in matters of life or death to the peo-

ple that they are related to—as I said, we want to be able to say to them that “when Uncle Sam takes you away from your home and sends you away to fight, Uncle Sam will protect you.” That is what I said to Maj. Spingarn when he asked me to draw this bill. Of course, he knows the situation, and my connection with it has simply been to make suggestions. My orders were simply to draw a bill accomplishing this purpose.

But, as I have said, the major purpose of this, or the necessity for it, arises from this existing fact, that a great class or number of ignorant persons, easily reached by a lying propaganda instigated by secret enemy agents, are getting into a mood where they say, “While I am fighting in France, you may grab my brother and hang him to a tree, and if I ask the United States Government to do something about it the Government will not take any interest in it, but will say that it is a matter for the States.”

Mr. IGOE. Do you think that we could go beyond those who are in the service or are liable to service in the Army?

Capt. HORNBLOWER. I think so, in the same way that you are providing in the war-risk insurance act for the families of the men you have called into the service.

Mr. IGOE. But in doing that under the war-risk insurance act we are not interfering with the States, or taking any jurisdiction away from them. We have the right, of course, to provide for the men in the military service and their dependents out of the Treasury of the United States. There is no question about that.

Capt. HORNBLOWER. But it grows out of the war powers of Congress. The only power expressly granted you by the Constitution to do that is under the war power.

Mr. IGOE. There is a great distinction there between paying money out of the Treasury of the United States to certain classes of people and this case where we would be invading the jurisdiction of the States themselves.

Capt. HORNBLOWER. You gentlemen felt that it was constitutional to provide that the Federal Government should punish a man in a State who would turn to somebody on the street corner and say, “Don’t you go in and register for military service; don’t do it; it is a bad thing to do.” You punish such a man under the Federal law.

Mr. IGOE. That would be for interfering with the registration of soldiers or recruiting the Army.

Capt. HORNBLOWER. Maj. Spingarn is here to testify that the situation which now exists may interfere with the recruiting of enlisted men for the service of the United States, and may seriously interfere with the morale of a large body of people from whom soldiers will be drawn. The situation is that when a riotous assemblage injures one of their near relatives the Federal Government will not do anything about it. It may be an unreasonable feeling on their part, but the point is, as Maj. Spingarn has indicated, that feeling exists.

The CHAIRMAN. Where do you find that this feeling most generally obtains?

Capt. HORNBLOWER. Maj. Spingarn can best answer that, Mr. Chairman.

Maj. SPINGARN. That feeling exists all over the country. I should say that it was as strong in the North as it is in the South.

The CHAIRMAN. I think so, undoubtedly. I live in the South, and our colored people down there are anxious to get into the Army.

Maj. SPINGARN. That feeling exists everywhere, in the North as well as in the South. One reason is that the colored people at the North have developed an "Intelligenza" which gives expression to their reasoning or ideas. They express themselves in print to a greater degree than they do in the South, but we have reports indicating that that condition exists everywhere. In fact, the report as to the demoralization of colored maids in a certain locality was from the North. On the other hand, the reports about the difference between the treatment accorded colored soldiers and colored civilians is from the South. That was from a colored newspaper in the South.

The CHAIRMAN. From what part of the South?

Maj. SPINGARN. Well, this particular one is neither from the South nor the North. It is from Missouri.

Mr. GARD. That might be characterized as "no man's land."

Maj. SPINGARN. This is from a colored newspaper:

While a negro man and his wife and two other negroes was being lynched without trial by a jury, and another negro was being lynched by a mob in Georgia as if he were a wild beast, Privates Henry Johnson and Needham Roberts were giving their lifeblood in order that the members of the dastardly mob might be spared the curse of autocracy.

That is a common argument in these colored newspapers—that is, that while they are fighting abroad, their relatives and dependents are being injured and lynched here.

Capt. HORNBLOWER. It seems to me that there is a good deal of justice in some of the complaints that these people make. They say, "Uncle Sam has taken us from our homes, and Uncle Sam says we must go to France, but when a lawless mob strings us up to a tree or sets fire to our houses, Uncle Sam says it is none of my business. I do not know anything about it and I have not anything to do with it." We simply want to be able, in time of war, to say to these men who are going to fight in the war that Uncle Sam is going to look out for their dependents.

The CHAIRMAN. But you must not forget that there would not be any Uncle Sam if it were not for the 48 sovereign States.

Capt. HORNBLOWER. That is true, of course.

The CHAIRMAN. That is what makes Uncle Sam. When you take jurisdiction away from those sovereign States you destroy Uncle Sam. I am in sympathy with anything that will counteract the propaganda you speak of, but the constitutional question is a very serious one, and I hope you will devote your argument to the question as to whether we have the right to make it a crime against the Federal Government for somebody to kill the kinsman of a Federal soldier inside of a State and away from a military reservation.

Capt. HORNBLOWER. I understand that I am to prepare a brief on that point, but as to how widespread this disaffection is I am unable to state, because I have not made a study of it. I have simply drafted a bill to accomplish the purpose that the major speaks of.

The CHAIRMAN. We are very much obliged to you gentlemen for your attendance and testimony this morning.

(Thereupon the committee adjourned.)

TO PROTECT CITIZENS AGAINST LYNCHING

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-FIFTH CONGRESS

SECOND SESSION

ON

H. R. 11279

Serial 66—Part 2

BRIEF OF CAPT. GEORGE S. HORNBLOWER

JULY 12, 1918



**WASHINGTON
GOVERNMENT PRINTING OFFICE
1918**

TO PROTECT CITIZENS AGAINST LYNCHING.

A BILL To punish crimes of lynching in so far as such crimes tend to prevent the success of the United States in war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the United States is at war, whoever shall participate in any mob or riotous assemblage whereby death or mortal injury is intentionally caused to any man or woman employed in the service of the United States or to any man liable to service in the military forces of the United States under the act approved May eighteenth, nineteen hundred and eighteen, entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States," or under any present or future statute of the United States, or to any person held under arrest by, or as a prisoner of, or in internment by the United States, or to the dependent wife, brother, sister, father, mother, son, daughter, nephew, or niece, whether of the whole blood or half blood, of any person in the military or naval forces of the United States, shall be deemed guilty of a capital offense against the United States, and shall, upon conviction, be punished in accordance with the punishment prescribed for the crime of murder under the United States Criminal Code.

BRIEF ON CONSTITUTIONALITY OF PROPOSED SUBSTITUTE.

STATEMENT.

The annexed proposed substitute for the bill H. R. 11279, introduced by Representative Dyer, was submitted to the Judiciary Committee on Thursday, June 6, 1918, by Maj. J. E. Spingarn, Infantry, United States Reserve Corps, at the invitation of Representative Gard, chairman of one of the subcommittees. The undersigned officer, who had drafted the bill for Maj. Spingarn, being present at the hearing, was asked by the committee to submit a brief as to the constitutionality of the proposal. This brief is submitted pursuant to that request and with the permission of the chief of the Military Intelligence Branch. It is, however, to be regarded only as expressing the views of the writer as a lawyer, since questions of constitutional law are not within the purview of the Military Intelligence Branch.

The proposed bill would be applicable only in time of war. At such times it would authorize the Federal Government to prosecute for the crime of lynching, in cases where the person lynched was either in Federal employ or liable to Federal military service or was a Federal prisoner or was a dependent near relative of a Federal soldier or sailor.

As to the lynching of a soldier or sailor the committee seemed surprised to be told that no Federal statute has been found in point. The part of the bill concerning the lynching of a Federal prisoner was not discussed at the hearing. But the final request of the chairman was:

I hope you will devote your argument to the question as to whether we have the right to make it a crime against the Federal Government for somebody to kill the kinsman of a Federal soldier inside of a State and away from a military reservation.

This brief, therefore, will be confined to a discussion of the proposition that the Constitution authorizes a Federal statute punishing, in time of war, the lynching of a potential soldier or the dependent relative of a soldier.

1. THE UNDERLYING PRINCIPLES.

Constitutional support for this bill is to be found in the clauses granting to Congress power "to declare war, to raise and support armies, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *" (Art. I, sec. 8, cls. 11, 12, and 18).

Doubtless support could also be found in the fourteenth amendment and the doctrine of the "peace of the United States," so ably discussed by Representative Dyer in explaining his bill (H. R. 11279) on May 7, when, after quoting Attorney General Gregory to the effect that lynching "is a deplorable thing under any circumstances, but at this time above all others it creates an extremely dangerous condition," Mr. Dyer said:

The early theory that the United States has no police power, so-called, or power to protect life or punish crimes of violence within the States, is already superseded by judicial decision. It is now determined by the highest authority that the United States has such power when a Federal right or duty is invaded or involved. The principle is neither new nor startling, though modern applications of it have attracted attention. For example, it is now held that the United States, by the hand of its marshal, may lawfully kill one who assaults a Federal judge traveling through a State in the course of his duty, and that the State can not hold the marshal to account for such killing (In re Neagle, 135 U. S., 1); and that the United States may punish as for murder one who kills a prisoner in the custody of a Federal officer within a State (Logan v. United States, 144 U. S., 263). The principle is that the persons so assailed are within the peace of the United States; that the United States owes them the duty of protection; and that the power of protection follows upon the duty.

The Dyer bill, however, involves a large question of permanent public policy, with which the military can have no concern. The substitute bill now proposed originated from war necessities and is limited to war times. We prefer, therefore, to discuss it only as a measure under the war powers of Congress.

The wide scope of these powers is ably pointed out in a report of the present Judiciary Committee of the House of Representatives, submitted by Chairman Webb on October 2, 1917, to accompany H. R. 6361 (H. Rept. No. 181, 65th Cong., 1st sess.). On pages 10 to 12 and 16 and 17:

The committee, however, is satisfied that the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.

Turning, first, to the words of the framers of the Constitution, we find the necessity for this broad power thus expressed by its most powerful spokesman, Alexander Hamilton:

"The authorities essential to the common defense are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies or the corresponding extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances, and ought to be under the direction of the same councils which are appointed to preside over the common defense."

This power must be interpreted, like all other powers under the Constitution, in the light of the classical principle of construction laid down in the opinion of Chief Justice Marshall (*McCullough v. Maryland*, 4 Wheat., 416) that Congress is to be allowed that discretion in relation to the powers conferred upon it which will enable it to perform its duties "in the manner most beneficial to the people," and that the end being legitimate and within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

In *Miller v. United States* (11 Wall., 260), a case decided in 1870, involving the constitutionality of the Federal confiscation acts as applied to enemy property found in a loyal State, the court, in answer to the suggestion that the power was unconstitutional, used the following language:

"The question, therefore, is whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." (11 Wall., 304.)

So far both majority and minority agreed.

* * * Surely the Federal Congress, in the prosecution of the war, may not only conscript the life of the citizen, but may, under the guarded discretion of the judges of the land as proposed in this measure, interfere with the property of the individual to the extent that such interference has been countenanced in this act for a purpose directly relating to the conduct of the war and the preservation of the morale and self-respect and the peace of mind of the citizen soldier whose body has been conscripted and taken from the peaceful walks of business life.

Officers of the Military Intelligence Branch are in a position peculiarly adapted to appreciate the soundness of Hamilton's dictum. "The circumstances that endanger the safety of nations are infinite." Secret machinations by German agents and subtle propaganda among large groups of our population have created unprecedented circumstances at the present time. In the only previous war, under the Constitution, which was serious enough to call for the drafting of the manhood of the Nation—the War of 1861–1865—our Federal Government was opposed by honorable belligerents, who fought fairly and above board. Hence there was no necessity for such exercise of the Federal war powers as shown in several of the acts of the present Congress. Court decisions precisely in point are therefore not available. But the necessity and appropriateness of laws to protect the soldier and his family as incident to carrying into execution the powers to declare war and raise and support armies were recognized in the stay laws of Civil War times and have been recognized ever since in the pension laws.

In so far as the present draft of a bill would punish the lynching of men eligible to military duty, its relation to the war power is

mathematically self-evident. In a war recognized as ultimately turning upon comparative man power the lynching of men registered or registerable for the United States military service necessarily reduces the factor of national safety.

And in so far as the proposal covers dependent relatives, its purpose is "the preservation of the morale and self-respect and the peace of mind of the citizen soldier," which, as the above-quoted committee report implies, is a purpose "so directly relating to the conduct of the war" that no judge's decision is necessary to demonstrate its constitutionality.

II. THE ANALOGY OF THE WAR-RISK AND SOLDIERS' RIGHTS ACTS.

In its aim to discharge a moral obligation to the soldiers and assure their patriotic morale by protecting their dependent kinsmen, this bill finds full precedent in the recent war-risk insurance act (H. R. 5723, Public, No. 90, 65th Cong., approved, Oct. 6, 1917) and the soldiers' and sailors' civil-rights act (H. R. 6361, Public, No. 103, 65th Cong., approved, Mar. 8, 1918).

Expressions concerning the former measure, made by eminent students of the Constitution, are strikingly in point. Let us look at the reports of the House Committee on Interstate and Foreign Commerce made to accompany H. R. 5725. In House Report No. 130 of the Sixty-fifth Congress, first session, submitted by Mr. Rayburn on August 30, 1917, we find the following, at page 3:

Your committee thinks this bill wise and beneficent in all its features, and though a radical departure in some respects, think it will prove a great blessing to our soldiers and their families and be very satisfactory to the country.

The first, second, and third features provide for the maintenance of the families of the soldiers during service and for compensation in case of death, and it is believed this is effected much more satisfactorily in this bill than in the existing pension system and will not be so expensive in the long run. The elements of certainty and security afford an incentive to the soldier to go forward, confident of protection by the Government to themselves and their families, and go far to mitigate the anguish of the families themselves during the unhappy separation from the soldiers.

TREASURY DEPARTMENT,
Washington, August 24, 1917.

Hon. W. C. ADAMSON,

Chairman Committee on Interstate and Foreign Commerce.

MY DEAR JUDGE ADAMSON:

* * * May I not again express my sincere and earnest conviction that no more important measure than this one is now pending in the Congress * * *. By providing now a comprehensive measure like the present one * * * providing definite allowances in case of death and total or partial permanent disability, and for the support of the dependent families of the men who go to the front, so that they shall not become objects of charity while the men are away fighting for their country. * * * We shall have told every man who enters the service of his country in advance what he may expect in every contingency, not only for his family but for himself. * * * I am most grateful to you and to the members of your committee for the opportunity you have given me to express my earnest approval of this measure.

Very sincerely, yours,

W. G. McAdoo.

In part 2 of the same report, Mr. Parker, submitting the views of the minority of the committee, said (p. 1):

It is, perhaps, not yet necessary that men with families should be forced into the battle lines. But in so far as they are not exempted, some provision like Article II for compulsory allotment of pay and a family allowance is necessary to take care of these families. * * *

And in part 3, the committee's supplemental report, a letter is quoted on page 7, as follows:

THE WHITE HOUSE,
U. S. S. "MAYFLOWER,"
September 1, 1917.

MY DEAR JUDGE: May I not express to you, and through you to the Committee on Interstate and Foreign Commerce of the House, my sincere gratification at the favorable report the committee has just made on the bill granting family allowances, indemnities, and life insurance for the officers and enlisted men of the Army and Navy, and the hope that the proposed measure may receive the prompt approval of the Congress?

There are so many arguments for the bill that I do not know which to put forward as the most imperative. No doubt you have assembled them in your mind in their most effective order. But what principally appeals to me about the bill is that it takes into consideration the whole obligation of the soldier not only, but the whole obligation of the Government—the obligations of justice and humanity both to the soldier and to his family. It is one of the most desirable pieces of legislation that has been proposed in connection with the war, and I can not too earnestly urge its adoption. * * *

Cordially and sincerely, yours,

WOODROW WILSON.

HON. W. C. ADAMSON,
House of Representatives.

And similar opinions as to the Government's obligations may be found throughout the debates on the bill. (See 55 Cong. Rec. 6753, 6815, 6890, 6963, 6988, 7030, 7038, 7070, 7104, 7681, 7736, 7737, 7764, 7836, 7837, et passim.)

So, in connection with the soldiers' and sailors' civil rights bill, H. R. 6361, now Public Law No. 103, we find repeated recognition that the power to raise armies involves as a corollary a Federal duty to protect the family of the man conscripted (or invited to volunteer) into the Army; also recognition that (as Mr. Dyer aptly puts it) "the power of protection follows upon the duty." And in two sections of that law, sections 300 (3) and 301 (1a) such protection is given by criminal provisions. From the House Judiciary Committee report of October 2, 1917 (Rept. No. 181), parts of which were quoted above, we submit the following convincing observations (pp. 1, 3, 4):

* * * a bill with a similar purpose. Introduced by Mr. Webb * * * had been drafted by the office of the Judge Advocate General under the immediate supervision of Maj. John H. Wigmore, well known as the author of the authoritative work on evidence, who is now a member of that office. The preparation of the original bill occupied Maj. Wigmore and his assistants for several weeks. * * * This bill is not the work of one man, but is the product of the suggestive criticism of almost every member of the Judiciary Committee. Throughout its meetings the committee has also had the benefit of the presence of the draftsmen of the original bill, and they have cooperated with the committee in every way. * * * The country is asking 2,000,000 of its young men to risk their lives, and if need be to give up their lives for their country. Before long even more will be asked to make the same sacrifice. Is it more than naked justice to give to the savings of these same men such just measure of protection as is possible? * * * The country asks the same service and should give the same protection to a soldier whether he comes from Massachusetts or California, from Maine or Louisiana. The law should be a general Federal law. * * * The Federal Government has a plenary power that is denied to the States. In the war power it has been given a power upon which, in the words of the Supreme Court of the United States in *Miller v. United States* (reported in 11 Wall., 268), "no restrictions are imposed. The power to declare war involves the power to prosecute by all means and in any manner in which war may be legitimately prosecuted by the law of nations." It was admitted by counsel for both sides in arguing the case, and both by the majority and minority of a divided court, that this power is supreme, and that the fifth amendment,

which in time of peace prohibits the depriving a person of property without due process of law, has no application in time of war to acts of the Federal Government germane to the war. With this decision before us it is not surprising that we should find similar expressions from such an eminent jurist as Mr. Justice Hughes and from such an authority as Eugene Wambaugh, professor of constitutional law in the Harvard Law School, and now major on the staff of the Judge Advocate General of the Army.

Can it be denied that, as Secretary Baker has said:

"The Army in France will be a more spirited and happy body of men, they will be healthier, they will be more effective as soldiers, they will be better citizens in every way. If, when they are thus forcibly separated from their homes, Congress says that no additional disadvantage shall come to them by reason of any oppressive action on the part of creditors."

It would be an unworthy reflection upon our Constitution that under it the Federal Government may send a man perhaps to his death in the trenches, but under that same Constitution is without power to hold his savings intact for him until his return.

(If the Federal Government can protect them against "oppressive action on the part of creditors," can it not protect against lawless action of murderers? If it has power to hold the soldier's "savings intact until his return," what of guarding his human possessions, for whom he made the savings?) Continuing the quotations (pp. 10-12, 17):

Because of the most careful consideration the bill has received at our hands both as to its form and purpose, we unanimously report this bill not only with the reconsideration [? recommendation] that the bill do pass, but that it receive the early attention of the House.

At the outset it is well to state that this committee believes that the authority for all legislation, whether or not in the nature of war-emergency legislation, must be found within the powers granted by the Constitution of Congress. In the words of the Supreme Court in the much discussed case of *Ex parte Milligan* (4 Wall., 2), "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." * * *

In the judgment of the committee the provisions of this bill are well within these "necessary powers." * * *

Constitutional support for this bill is to be found in the granting to Congress of power "to declare war, to raise and support armies, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." * * *

Without burdening this report with citations, a single quotation from a well-considered decision of the Supreme Court in *Stewart v. Kahn* (11 Wall., 493, 1870) is of value not only as of general application, but as bearing directly upon the provisions of this bill.

In that case there was presented to the Supreme Court the question of the constitutionality of the Civil War limitation act of 1864. * * * The language of the Supreme Court * * * is a direct application to the problem before us:

"Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." * * *

This law, it is to be noted, was held to apply not only to the Federal but to the State courts. As thus construed the decision was affirmed in 1884 in *Mayfield v. Richards* (115 U. S., 137, p. 142). * * *

The question before us therefore is, Is the proposed act "appropriate" or "plainly adapted" to the great end of the conduct of war and the support of an army? Does it or does it not present a direct effort "to remedy the evils which arisen" and will continue to arise from its progress? If so, and no prohibition of the act can be found, it must be sustained. * * *

As has already been stated, the scope of the act is to protect the members of the military forces of the United States during the period of the war * * *. And it has been well said:

"If a State may thus, notwithstanding a due process limitation, interfere with life, liberty, and property for the sake of health, morals, quiet, and the like, it follows, a fortiori, that notwithstanding a due process restriction the United States may interfere with life, liberty, and property for the sake of protecting the very existence of the Government itself."

If this may be done by the States without impairment of the constitutional prohibition, surely the Federal Congress, in the prosecution of the war, may * * * interfere for * * * the preservation of the morale and the self-respect and the peace of mind of the citizen-soldier * * *.

That was a unanimous report of a committee composed of men selected because of their distinction as lawyers. The Senate Judiciary Committee was not unanimous; but its distinguished chairman, in a debate with Senator Hardwick, set forth the views of the majority so forcibly as to carry the bill through the Senate with "yeas 63, nays 0." The debate occurred on February 6, 1918, and the Congressional Record of that date (vol. 56, No. 41, pp. 1884-1885) contains the following:

MR. GRONNA. It really protects the man's home, if he has a mortgage on it. Is that correct?

MR. OVERMAN. That is correct.

MR. President, so far as the constitutionality is concerned, when that point was raised in the committee, a subcommittee composed of the Senator from Connecticut [Mr. Brandegee], the Senator from Florida [Mr. Fletcher], the Senator from Missouri [Mr. Reed], the Senator from Vermont [Mr. Dillingham], and myself concluded that there was no use to consider this bill if the Judiciary Committee should say it was unconstitutional, as one member contended. So we took the matter before the Judiciary Committee to consider the constitutionality of the bill, and the following resolution was passed by a large majority of the committee, the resolution having been introduced by the Senator from South Dakota [Mr. Sterling]:

"Resolved, That it is the sense of the Committee on the Judiciary that the Congress has the power to enact a reasonable stay law, which may control the processes and proceedings of the State courts, and that the subcommittee shall draft a bill accordingly * * *."

I call the attention of the Senator to this language, which is in line with the great speech made here by the Senator from Pennsylvania [Mr. Knox] on this subject, taking the position that wherever it is necessary for the efficient prosecution of the war, to win the war all powers should be subordinated and all constitutional limitations fade away when we consider them in conjunction with the power granted in the Constitution to Congress to declare war and the President as Commander in Chief to fight the war.

MR. HARDWICK. The Senator, of course, is referring to the Gettysburg case?

MR. OVERMAN. Yes. * * * Listen to this language:

"It results from the powers that are given, and it is implied because of its necessity or because it is appropriate in exercising these powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid."

Any power exercised by Congress which is necessary for the protection of the Army or to make the Army more efficient is constitutional.

MR. HARDWICK. Now, the Senator has gotten exactly to what I wanted to find out. Would the Senator contend that Congress could do that if it were not in the exercise of the war power?

MR. OVERMAN. I think not.

MR. HARDWICK. That is all I wanted to ask the Senator.

MR. OVERMAN. In the exercise of the war powers granted to the President he can do anything necessary in order to win the war and preserve the Constitution, and Congress can pass any law that is necessary to preserve the Constitution. * * *

Mr. President. I think the decisions I have cited are in point—certainly one of them is—and the principle laid down in the Gettysburg case is a principle which ought to govern us. The Judiciary Committee themselves, with probably two exceptions, think this bill is constitutional. * * *"

Mr. HARDWICK. Mr. President, if I may have the attention of the Senate for a moment, I desire to say to the Senator in charge of the bill that I am not opposing the bill, because I am in sympathy with the motive that prompts the committee to report this bill and the motive that prompts Congress to pass it. I understand full well that when men go into the military or naval service of the country they ought not to be required to look after their estates or to attend court, and that there is ample reason and justification for this sort of law as a military matter; that is, if the bill does not go further than that. I am inclined to agree with the Senator just offhand—I have neither read the bill carefully nor studied the constitutional question—that under the war power Congress might, in order to insure the efficient prosecution of the war, adopt whatever provisions of this sort were necessary, but as I heard the resolution of the Committee on the Judiciary read, I want to enter my emphatic dissent to the proposition announced, * * * because if the fifth amendment of the Constitution of the United States means anything, Congress can not, unless it is in the exercise of the war power, impair the obligation of contracts or pass a stay law.

On this other question I can say that I can see every reason why, in order that the men who have enlisted and have rallied to the colors, both in the military and the naval service, may be unvexed in mind and estate while they are risking their lives in the service of the country, they should not be troubled with lawsuits; and I am in as hearty sympathy with the Senator from North Carolina and with any other Senator on that question as I possibly can be.

With such explanations that bill passed both Houses unanimously. (See 55th Cong. Rec., 7730-7733, 7787-7806; 56th Cong. Rec., 1883-1891.) It can, therefore, be safely asserted that practically all the most eminent lawyers in elective Federal office (many of them ex-judges) believe that, notwithstanding the reserved right of the States, Congress has complete constitutional power, in time of war, to legislate for the peace of mind of the soldier by the protection of his family. With such authority for this general proposition and no authority found in the books to the contrary, it remains only to consider the constitutionality of the means by which the measure now under discussion proposes to carry out this purpose.

III. THE ANALOGY OF THE SABOTAGE AND DISLOYALTY ACTS.

We have seen that in purpose the proposed bill runs parallel with the soldiers' and sailors' civil rights act. It differs from that statute chiefly in that, where the act of February, 1918, checks civil remedies in State courts and restricts civil rights granted by State laws, the proposed statute would simply add a cumulative criminal remedy for what is already denounced as a crime by the laws of every State. Yet, curiously enough, the new proposal is called in question, as an infringement of States' rights, by the authors of that much more federalistic measure.

The answer to the objection that this bill would "go down into the home States of the people and subject them to trial in a Federal court" is that parts of the above-discussed 1918 legislation and practically every section of the United States criminal code and every title of the espionage act do the very same thing. And the constitutionality of the Federal criminal code is so universally recognized that, despite its long existence, it would probably be impossible

to find a reported case raising any question as to its general validity. But, if authority be required for a Federal war statute subjecting the citizens of the States to trial in the Federal courts, we need go no further back than the recent amendment of the espionage law (made by H. R. 8753, Public Law No. 150, 65th Cong., 2d sess.), approved May 16, 1918, and the sabotage act (S. 383, Public Law, No. 135, 65th Cong., 2d sess.), approved April 20, 1918.

The sabotage bill is said to have been first drafted by the Attorney General of the United States, and in its final form it had the unanimous indorsement of the most eminent jurists in both Houses of Congress. It authorizes Federal prosecution of persons who in time of war destroy material "intended for, adapted to, or suitable for the use of the United States or any associate nation in connection with the conduct of the war." (The antilynching bill now under discussion does not go so far, since it takes no cognizance of the interests of any associate nation. Nor does it create any new crime, like that specified in section 3 of the sabotage act.) But where the sabotage act punishes the destruction of material, the proposed statute would punish the destruction of personnel "intended for, adapted to, or suitable for the use of the United States in connection with the conduct of the war."

As to the constitutionality of that parallel measure, Mr. Webb, from the Committee on the Judiciary, submitted to the House of Representatives on April 13, 1917, the following House Report No. 11:

The Committee on the Judiciary, having considered S. 383, unanimously recommend that the bill pass.

The act will apply only during the war.

The unlawful acts denounced in the bill are covered in most cases by State laws, but in time of war it is important for the national defense that such unlawful acts, so peculiarly aimed at the success of our arms, should be denounced and penalized by the Congress of the United States.

On April 18, 1917, Republican Leader Mann, without questioning the constitutionality of the bill, expressed misgiving about its wisdom from the standpoint of public policy, and Representative Moon then challenged Chairman Webb to show its constitutionality. (See vol. 55 of the Congressional Record, Part I, pp. 821-822.) Mr. Webb referred the bill to a subcommittee, and after about a year's consideration the Judiciary Committee brought forward an amended version, in many respects more radical than the Department of Justice draft. On March 6, 1918, Mr. Webb, Mr. Madden, Mr. Stafford, and Mr. Gard explained the constitutional propriety of the new bill in the following forcible statements, found in volume 56 of the Congressional Record, No. 68, pages 3375, 3376, and 3379:

MR. WEBB. * * * The committee did not want to make it too broad. * * * At the same time, they wanted to make it broad enough to cover anybody who would try to prevent or delay or hinder the successful prosecution of the war. * * * I yield to my friend from Illinois.

MR. MADDEN. Of course, this gives any person charged with a crime described in this bill the right to a defense, to prove his case, if he is innocent?

MR. WEBB. Oh, absolutely. This is a civil bill, and will be enforced by the civil court.

MR. MADDEN. I do not think it can be too drastic myself. If we are in this war to win, we have got to provide the means to win, and we must surround the Government with every safeguard to enable it to carry out the functions that devolve upon us by reason of the fact that we are in the war. Personally

I believe the committee have done a good job, and there ought not to be any question about the adoption of this bill without a debate, it seems to me.

Mr. WEBB. I thank the gentleman. * * * We are perfectly willing to make it as broad as necessary, and if the gentleman can make any suggestion, we shall be glad to consider it. This is practically the language suggested by the Attorney General. We have taken practically his definition of war premises. * * * I will say that if the striker should throw a bomb into a munition plant in which he had been at work for the purpose of blowing up and killing or injuring the man for whom he is at work, he would be guilty under this bill, if the jury should find—and, of course, it would find without any hesitation—that he had reason to believe that blowing up the factory would interfere with the prosecution of the war.

Mr. STAFFORD. There is no one in this Chamber who does not wish to punish that character of man to the greatest extent, and not only give State authorities the jurisdiction which they now have but give national authority to prosecute such act.

Mr. GARD. Mr. Speaker, this is essentially a matter of war legislation. * * * It is, as I say, essentially a matter of war legislation, for it is an assemblage under the control and protection of the Government of things which are thought necessary for the continuance and perpetuity of the national life. Therefore, to the centralized power of the Government of all the States—not in time of peace, but in time of war—is intrusted the protection of war materials, of war premises, and of war utilities. * * * This bill seeks to protect with all the power of the United States the things which are necessary for the winning of this war by the United States and its associate nations.

And, as Mr. Webb and others explained in the debate, this power was purposely made applicable “inside of a State and away from a military reservation.” (See vol. 56, Cong. Rec., 3376–3390.)

In the Senate the debate was concerned chiefly with the Lunn amendment, but the same ideas were expressed or tacitly assumed by all the Senators.

By the sabotage act, to protect material necessary for winning the war, it is concededly constitutional for the Federal Government to prosecute in a Federal court in his home State a striker who throws a bomb into a munition plant, when the offender has reason to believe that blowing up the factory would interfere with the prosecution of the war. It must therefore be constitutional to provide for similar prosecution of a lyncher who destroys the life of a soldier or a potential soldier necessary to the United States for the winning of the war, when everyone knows or has reason to believe that the slaughter of an American soldier or potential American soldier tends to interfere with the military success of the United States. The same reasons which won the support of Messrs. Webb and Gard and their learned and patriotic colleagues on behalf of a bill seeking “to protect with all of the power of the United States the things which are necessary for the winning of this war” are submitted by us in support of this bill seeking to protect with all the power of the United States the persons who are necessary for the winning of the war.

True, the proposed measure, besides covering the destruction of persons needed in winning the war, punishes the destruction of certain of their relatives. But the protection of such persons is within the scope of the war powers, as shown by the arguments for the two soldiers' relief measures discussed under point “I” above. And the rationale of the sabotage act shows that the protection of whatever the Government has a right to protect can be given by means of a criminal statute.

Indeed, the furnishing of protection to soldiers' families by means of Federal criminal legislation was recognized as legitimate in con-

nection with both the war-risk insurance act and the recent civil-rights act. Section 405 of the former (transferred to sec. 13 by the Sims Act of May 20, 1918; Public No. 151, 65th Cong.; H. R. 11245) provides that—

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

And the act of March 8, 1918 (Public, No. 103, Sixty-fifth Congress, H. R. 6361), contains in sections 300 and 301 the following:

(3). Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed \$1,000, or both. * * *

(1a) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

A still more up-to-date analogy is found in the new disloyalty act, sometimes called (erroneously; cf. Criminal Code, section 6) the sedition act, which amends section 3 of Title I of the espionage act. The object of that statute was to protect the morale of the soldiers and the civilian population, and it sought that object by authorizing Federal prosecution of various kinds of conduct partly punishable already under State laws.

No Member of the House suggested that this espionage act amendment was an "invading of the jurisdiction of the States themselves" in subjecting citizens of the States to trial in the Federal courts for any utterance or conduct which tends to incite disloyalty among the troops or obstruct the enlistment service or bring the form of Government of the United States into disrepute. It surely does not need the testimony of officers of the Military Intelligence branch to show that unpunished lynching of the relatives of American negro soldiers will tend to undermine the loyalty of such soldiers, and discourage the recruiting of soldiers from that race, far more effectually than any mere utterances of contempt for the United States (unless, perhaps, they be utterances, such as are now being circulated among the negro population of this country, concerning the insufficiency of our form of government to give protection to negroes).

The whole question is simply whether this proposed bill is "necessary and proper * * * for carrying into execution the * * * powers vested by this Constitution in the Government of the United States" * * * with respect to making war and raising armies. Experts specially charged with the duty of studying the situation are prepared to testify that it is necessary. And a comparison of it with the disloyalty act shows that it is clearly appropriate; since the unpunished lynching of the dependent wife, sister, daughter, son, or brother of an American sergeant, in some company holding under trying circumstances a strategic position on the front lines in France, would be far more likely to have a disastrous effect upon the outcome of the war than the unpunished utterance of the most scurrilous possible language about the flag of the United States.

Like all this recent legislation, our proposed bill is designed to serve "the great end of the conduct of the war and the support of the Army." (See p. 11, *supra*.) It presents "a direct effort 'to remedy evils which have arisen' and will continue to arise from its [the war's] progress" (p. 11). It "plainly and directly tends to enhance the respect and love" of a numerous type of citizen-soldier "for the institutions of his country, and to quicken and strengthen his motives to defend them" (p. 13). It is submitted as necessary for the protection of at least a part of the Army and "to make the Army more efficient" (p. 13) by making certain racial groups of its soldiers "a more spirited and happy body of men, * * * healthier, * * * more effective as soldiers, * * * better citizens in every way" (p. 10). By providing a cumulative remedy against a prevalent crime, which "at this time above all others * * * creates an extremely dangerous condition" (p. 3), the bill seeks to make sure that these "men who have enlisted and have rallied to the colors, both in the military and the naval service, may be unvexed in mind and estate while risking their lives in the service of the country" (p. 14). It seeks to counter enemy propaganda by repudiating "an unworthy reflection upon our Constitution that under it the Federal Government may send a man to his death in the trenches, but under that same Constitution is without power to hold his" loved ones safe from mob murder "until his return" (p. 10). It is "essentially a matter of war legislation," which recognizes that "to the centralized power of the Government of all the States—not in time of peace but in time of war"—there should be accorded a power "to protect" (p. 18) great groups of citizens whose loyalty is "necessary for the winning of the war," and to discharge what the President calls "the whole obligation of the Government"—that is, "justice and humanity, both to the soldier and to his family" (p. 8). Our bill is submitted in the belief that if you do this you will defeat enemy propaganda among one of the racial groups, which it most affects, far more completely than you could by the most vigorous possible enforcement of section 3 of the espionage act.

IV. THE LIMITATIONS OF THE PROPOSAL.

Our proposed substitute bill does not even superficially conflict with a single prohibition in the Constitution. Nor does it attempt to establish any new permanent public policy. It does not, like the war risk insurance acts, create any new Federal bureau. It does not, like the soldiers' civil rights act, override any State statutes. It does not, like section 3 of the sabotage act or the amended section 3 of the espionage act, create any new crime. It simply authorizes Federal remedial action to enforce the declared public policy of the States, concerning what is everywhere legally and morally a crime. And it authorizes such action only in time of war and only to the extent that such crime tends to interfere with the successful prosecution of the war.

CONCLUSION.

The learned members of the Judiciary Committee need not be reminded that the question of the wisdom of a particular measure from

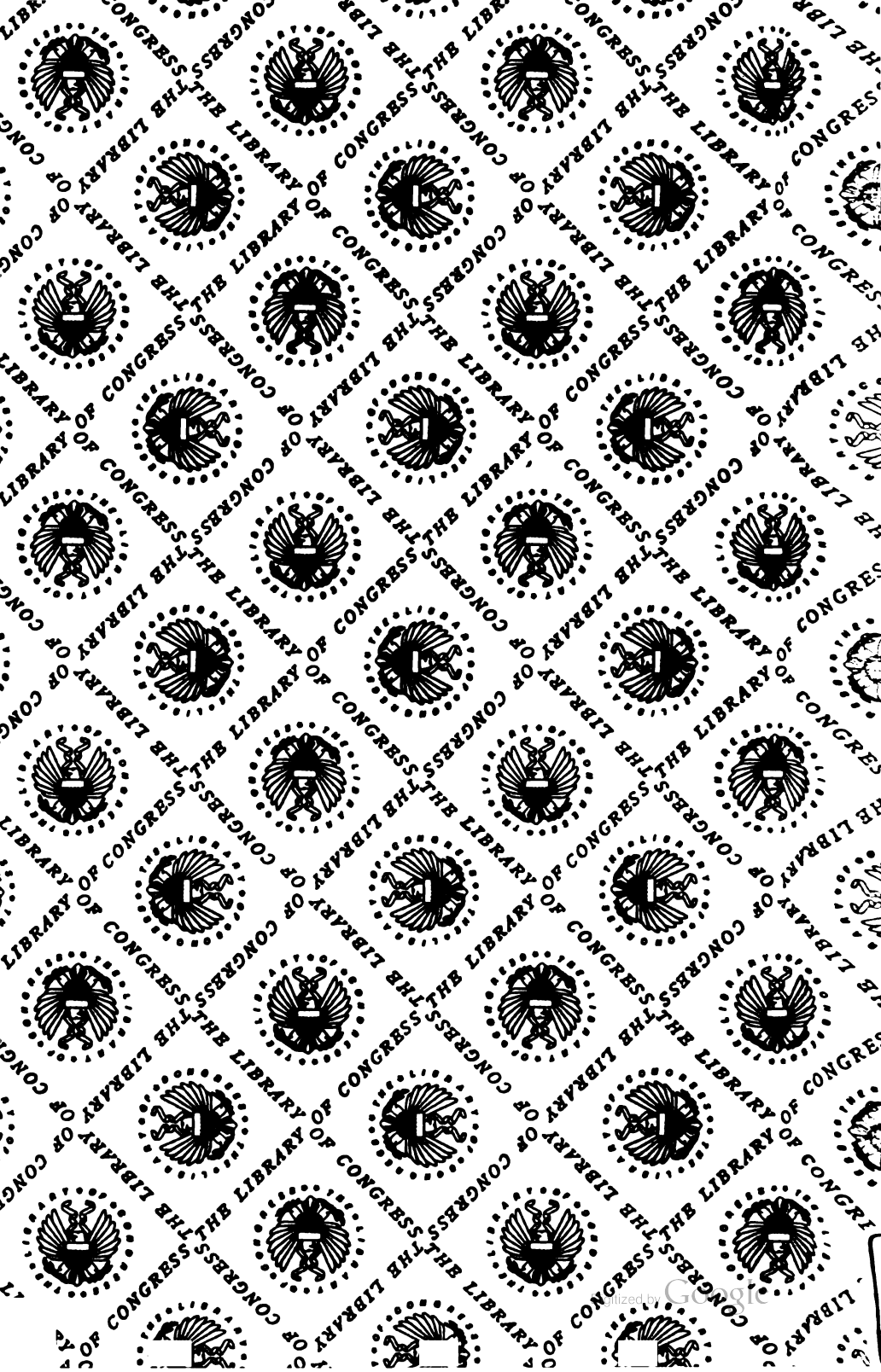
the standpoint of public policy is quite a different thing from a question of constitutionality. There may be factors in public sentiment presenting reasons against this bill, which did not apply to the above-discussed war measures. But, on the strength of the reasons above set forth, it is submitted that the objections to this bill, suggested by some of the members of the committee, are founded on matters other than constitutional limitations.

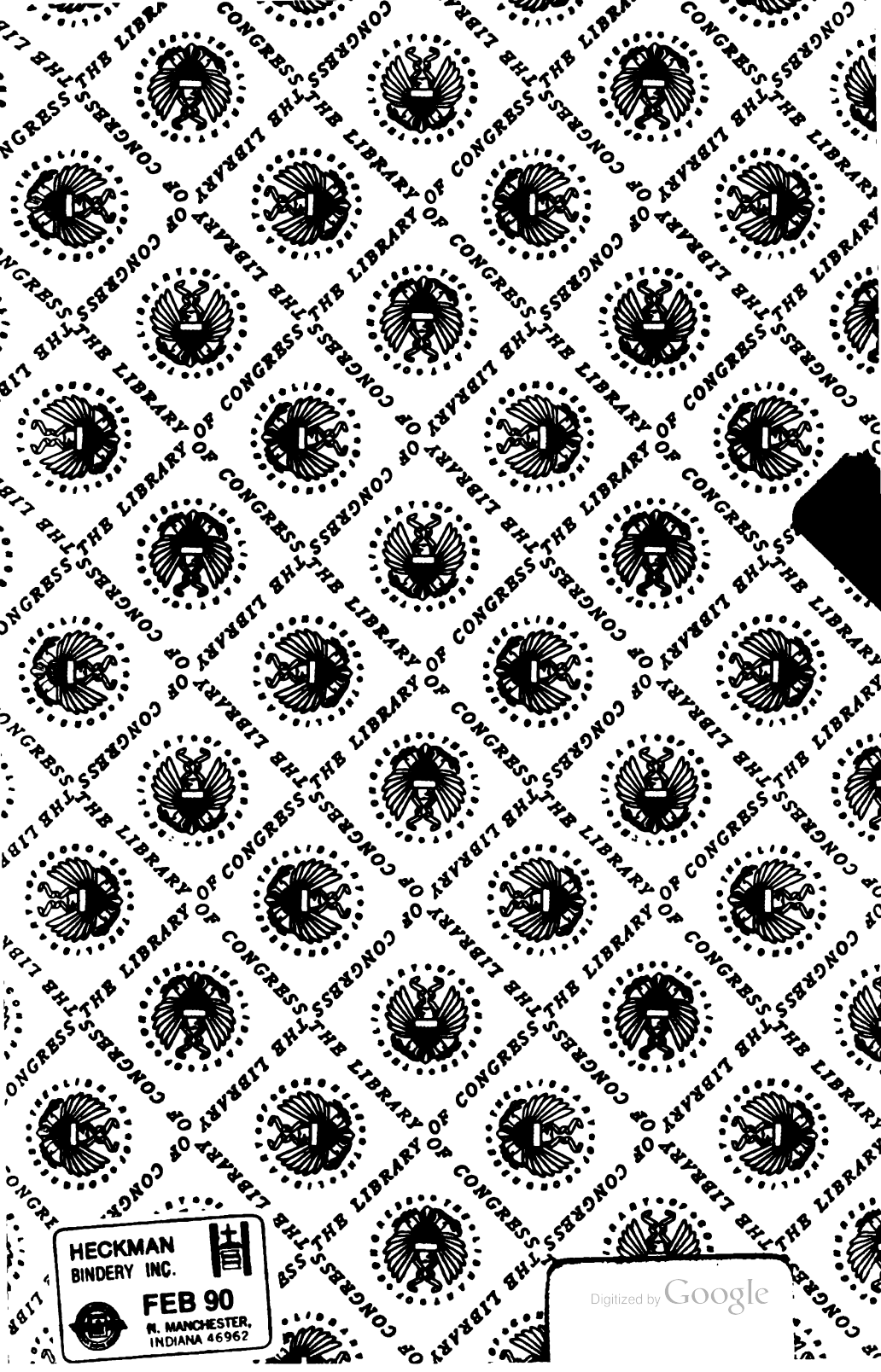
Since it shows the same beneficent purpose as the war risk insurance act, the same discharge of moral obligations as the soldiers' and sailors' civil rights act, the same mode of operation as the sabotage act, and the same bearing upon military morale as the disloyalty act—all of which are upheld as constitutional by the practically unanimous opinion of the lawmakers of the Nation—and since its necessity for war purposes can be shown by experts and its appropriateness as a war measure is shown by mere quotation of the leading judicial and legislative pronouncements concerning the scope of Federal war power—this proposed substitute for the Dyer bill is confidently believed by the undersigned to be constitutional.

Respectfully submitted.

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Captain, National Army,
Of the New York Bar.

WASHINGTON, D. C., *June 22, 1918.*





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